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THE
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I.—LEGAL EDUCATION IN GERMANY.

“Winds from all quarters agitate the air,
And fit the limpid element for use.”—*Cooper*.

IN the long run of human history there was never a nation in which sound legal training, on a basis both scientific and practical, was so important as it is now in England. Her commercial interests are more widely extended, her business transactions more varied and on a larger scale than ever before. Intimate relations have grown up with countries where different systems of law prevail. Thus the training of men who shall act as legal advisers and judges at home, as well as in the wide dependencies abroad, has become a matter of the gravest public concern. Is the present system of legal education in England an ideal one? Is it adequate to, and worthy of, one of the first and noblest human sciences? Shall the state of affairs which exists to-day be allowed to continue to drift, or is it not now urgent, in the interests of the profession and of the public, to make a determined effort to put the study of law on a higher plane?

Perhaps I can throw some light upon these questions indirectly by showing what is being done in the way of legal training in Germany. I shall base my remarks upon Prussia, as the typical German State, because it represents about

two-thirds of modern Germany, and takes the lead not only in political, but also in educational matters. Since the Franco-German war, all the other twenty-five smaller German States have adopted nearly the same system of legal education.

The necessary qualification for a call to the Bar is attained in Germany by passing two legal examinations. The first one must be preceded by at least a three years' course in law at a University. Between the first and the second examination there must be a period of four years, which is to be spent in practical service, partly at the different Courts of Justice, partly in the chambers of practising advocates ("*Rechtsanwälte*"), and partly in the chambers of a public prosecutor ("*Staatsanwalt*").

As to the admission of young men to the Universities as students of law, there are several regulations, issued by the State Department of Justice ("*Justizministerium*") and by the State Department of Public Education ("*Unterrichtsministerium*"). One of the most important of those referring to educational qualifications is a regulation, dated February 1, 1902, and published in the *Centralblatt fuer die gesamte Unterrichtsverwaltung*, 1902, p. 275, in which the following is prescribed:—

- (1) The most suitable institution for preparation for the study of law is the Classical School ("*Gymnasium*").
- (2) Besides those students who have the necessary certificate, *i. e.*, the so-called "*Zeugnis der Reife*" or "*Abiturientenzeugnis*," from such a Classical School, there may be admitted to the study of law also such individuals as have finished the course of study at a Science School ("*Realgymnasium*" or "*Ober-Realschule*").
- (3) In order to understand thoroughly the sources of Roman law, students of the last-mentioned class,

and those who have not attained proficiency in Latin at a Classical School, have to take courses in Latin during their University study.

- (4) At the first legal examination, after their three years study at the University, students falling under (2) and (3) must show that they have acquired, in addition to their legal knowledge, a thorough knowledge of Latin.

It can scarcely be denied, that in Germany secondary education is more completely organised and of a higher grade than in any other part of the globe. The final examination at a "*Gymnasium*," generally passed at an age between 18 and 22, is, without doubt, as difficult and of the same scientific value as an honour degree in Classics at any English University. This final examination was, till 1902, an absolutely necessary requisite of any German law student. Only by express command of the present Emperor, and against the declared opinions and wishes of the highest legal authorities in Germany, a slight modification has recently taken place in favour of those students who have gone through a course of secondary education at a Science School; nevertheless, with the restrictions mentioned above.

It is a fundamental principle adhered to by all German authorities, that the best liberal education a country can afford must be the foundation on which is built a legal education, and that such liberal education is absolutely necessary to avoid that contraction of mind which the study of law always has a tendency to cause. It is further recognised in Germany, that a thorough knowledge of Latin is the *conditio sine qua non* of any adequate legal training. All legal systems of modern Europe have, to a greater or less extent, as their common sources Roman and Canon law. Both are written in Latin. Lectures on Roman and Canon law are unintelligible and useless, as long as the students

are not able to read and translate instantly any passage of the *Corpus Juris Civilis* as well as *Canonici*. Without such a mastery of Latin the law student after having attended a lecture on Roman or Canon law will go and say :

“ The wise men of Egypt were secret as dummies,
And e'en when they most condescended to teach,
They packed up their meaning, as they did their mummies,
In so many wrappers, 'twas out of one's reach.”

When, now, the German student has fulfilled all these preliminary conditions and presents himself at the University as a student of Law, what is expected of him during his further academic study ? The following is a list of the obligatory lectures, both on Law and Political Science.

A.—ON LAW.

1. Legal Encyclopædia, or Introduction to Law.
2. History of Roman Law.
3. German legal history.
4. The system of Roman Law (Substantive Law).
5. Procedure in Roman Law (Adjective Law).
6. Outlines of ancient German (Teutonic) Law.
7. Exposition of the development of legal institutions in Prussia.
8. Modern German Private Law (German Civil Code) :
 - (a) General sketch and survey.
 - (b) Detailed explanations of the different parts of the Code ;
viz. :—
 - a. General Part (Book I).
 - β. Law of Contracts and Torts (Book II).
 - γ. Law of Personal and Real Property (Book III).
 - δ. Family Law (Book IV).
 - e. Law of Inheritance (Book V).
9. Commercial Law.
10. Law of Bills of Exchange, Promissory Notes, and Cheques.
11. Maritime Law.
12. Organisation and functions of the Courts of Justice.
13. German Civil Procedure.

14. Execution of Judgments.
15. Law of Bankruptcy.
16. Criminal Law.
17. Criminal Procedure.
18. Ecclesiastical Law (*Corpus Juris Canonici* and modern Roman Catholic and Evangelical Law).
19. German and Prussian Constitutional Law.
20. German and Prussian Administrative Law.
21. Public International Law (Law of Nations).
22. Private International Law (Conflict of Laws).
23. Philosophy of Law (Jurisprudence).
24. Forensic Medicine.

B.—ON POLITICAL SCIENCE.

1. Theoretical or General Political Economy.
2. Practical or Special Political Economy.
3. Finance.

In addition to these lectures law students are obliged to attend a certain number of classes and seminaries, in which they receive not only a catechetical instruction, but have also to write essays on legal questions from time to time. All these essays, after having been corrected by the professor, are returned to the pupil with a written criticism. These papers, together with the said criticisms, are kept by the students and must be submitted to the examiners before the students are allowed to enter upon their first legal examination.

Furthermore, law students are requested to attend lectures on Logic, Psychology and history of Philosophy, as well as on general Roman and German history, delivered in the faculty of Philosophy at their University. This amounts practically to a requirement, since at the examination the examiners have a right to assure themselves that the legal knowledge of the candidate is grounded on a thorough knowledge of the subjects just mentioned.

Truly a formidable list of lectures! Therefore it is not in the least to be wondered at, that the average student encounters difficulties in dividing the courses so as to hear them all within three years and in the right order. In consequence of this, most of the Universities have prescribed, subject to slight alterations, a programme in which the lectures are arranged in what is deemed the best sequence. The examiners are empowered to debar from the examination any student who has not heard the lectures in proper order. For the benefit of English readers I may say that the academic year in Germany is divided into two parts, called "*Semesters*," each extending over about four and a-half months, three months of the year being consumed by vacations. As examples of such a programme I give those prescribed by the Universities of Göttingen and Münster.

I.—UNIVERSITY OF GÖTTINGEN.

First Semester.

Introduction to Law	2 lectures weekly.
History of Roman Law	4 lectures weekly.
System of Roman Law (Substantive Law)	6 lectures weekly.
Procedure in Roman Law (Adjective Law)	1 lecture weekly.
Practical exercises in Roman Law, with written themes	twice a week.

Second Semester.

German legal history	4 lectures weekly.
Outlines of ancient German Law	4 lectures weekly.
German Civil Code, first part (Books I and II), i. e., General Part and the Law of Contracts and Torts	8 lectures weekly.
Practical exercises in ancient German Law, with • written themes	twice a week.

Third Semester.

German Civil Code, second and third parts (Books III to V of the Code), i. e., Law of Personal and Real Property, Family Law, Law of Inheritance	10 lectures weekly.
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Exposition of the development of legal institutions in Prussia	1 lecture weekly.
Philosophy of Law (Jurisprudence)	3 lectures weekly.
Practical exercises for beginners in modern German Private Law, with written themes	twice a week.
Theoretical Political Science	4 lectures a week.

Fourth Semester.

Commercial Law, including Law of Bills of Exchange, etc., and Maritime Law	5 lectures weekly.
Criminal Law	5 lectures weekly.
German and Prussian Constitutional Law	5 lectures weekly.
Practical Political Science	4 lectures weekly.
Finance	4 lectures weekly.

Fifth Semester.

Civil Procedure	5 lectures weekly.
German and Prussian Administrative Law	4 lectures weekly.
Canon Law	4 lectures weekly.
Forensic Medicine	1 lecture weekly.
Practical exercises for advanced students in modern German Private Law, with written themes	twice a week.
Practical exercises in Criminal Law, with written themes	twice a week.

Sixth Semester.

Criminal Procedure	3 lectures a week.
International Law	3 lectures weekly.
Practical exercises in Civil Procedure, with written themes	twice a week.
Practical exercises in Commercial Law, with written themes	twice a week.
Practical exercises in Political Science and Economics, with written themes	twice a week.

II.—UNIVERSITY OF MÜNSTER.

First Semester.

1. Introduction to Law (Legal Encyclopædia).
2. System of Roman Law (Substantive Law).

3. Roman legal history.
4. Roman Procedure Law (Adjective Law).
5. Reading and exposition of the sources of Roman Law.
6. Theoretical or General Political Science.
7. History of Economics and Socialism.

Second Semester.

1. German Civil Code, Books I and II (General Part and Law of Contracts and Torts).
2. German legal history.
3. Outlines of ancient German Law.
4. Practical exercises for beginners in modern Private Law, with written themes.
5. Colonial Politics and Colonial Law.
6. Money and Credit.

Third and Fourth Semester.

1. German Civil Code, Books III to V (Law of Personal and Real Property, Family Law, Law of Inheritance).
2. Civil Procedure.
3. Criminal Law.
4. German and Prussian Constitutional Law.
5. Commercial Law, including Law of Bills of Exchange, etc., and Maritime Law.
6. Practical exercises for advanced students in modern Private Law, with written themes.
7. Practical exercises in Criminal Law, with written themes.
8. Practical exercises in Roman Law, with written themes.
9. Reading and exposition of the sources of ancient German Law.
10. Practical or Special Political Science.
11. Practical exercises for beginners in Political Science, with written themes.

Fifth and Sixth Semester.

1. Execution of Judgments and Law of Bankruptcy.
2. Canon Law.
3. German and Prussian Administrative Law.
4. Criminal Procedure.
5. International Law.
6. Exposition of the development of legal institutions in Prussia.
7. Philosophy of Law (Jurisprudence).

8. Practical exercises in Civil Procedure, with written themes.
9. Practical exercises in Constitutional and Administrative Law, with written themes.
10. Practical exercises in Commercial Law, with written themes.
11. Finance.
12. Statistics and statistical exercises.
13. Practical exercises for advanced students in Political Science, with written themes.

As it is very difficult for the average student to finish the required course of study in the short space of three years, the authorities of all German Universities recommend that the law student devote *four* years to the study of law before he tries to pass the first legal examination. Indeed, the law student will usually find it necessary to spend four years at the University in order to finish the prescribed course. The result is that the required academic study in law extends practically over four years in Germany.

There can be no doubt that the academical curriculum to be followed up by a German law student is a very comprehensive one. At first sight there would seem to be no gap or defect in it. Nevertheless, I venture to offer some critical remarks.

My first objection is, that at no German University is a course in Comparative law compulsory. The consequence is that no German law student is prepared later to extend his legal horizon beyond the boundaries of his native laws into the domains of foreign legal institutions. To show the results of such a one-sided education I should like to call attention to a decision rendered recently by the highest Court of Justice for the German provinces Alsace-Lorraine. On the twenty-sixth day of June, 1903, five German judges of the Court of Appeal of Colmar ("*Oberlandesgericht Colmar, I. Civil-Senat*") had to deliver judgment in a civil action in which they had to consider, among other things, the meaning of the English legal terms "agreement to sell"

and "sale." Although the difference is so simple that no English law student would be at a loss to give immediately a satisfactory explanation, and although the litigants in the said action brought before the Court the best English authorities on this point, the five judges, grown old in German legal lore, were quite unable to grasp the distinction and did not hesitate to declare that the English Acts of Parliament, the decisions of superior English Courts of Justice, and the interpretations of the most famous English text-writers were all "erroneous"! To-day, when all civilised nations of the world have been brought into such a close connection with one another by commerce, improved methods of transportation, and community of interests, a certain knowledge of Comparative law and the main legal principles of the chief trading countries is absolutely necessary to the equipment of a full-fledged lawyer.

Another—and in my opinion a very serious—objection is, that the student, instead of taking several examinations during his academical course of study, must at the end of the three or four years pass an examination on all the subjects mentioned above at once. What are the consequences? The young law student at the outset of his University career says to himself: "My examination is four years off; therefore I have no need to study hard now and may enjoy myself." When the time for the examination comes, he sees too late his mistake. What is to be done? He must go to a "coach." This clever man, by giving valuable "tips," and training him to answer set questions on about thirty subjects in four or five hours, will enable him to pass a satisfactory examination after a course of six months' "cramming." On the other hand a young man, who has studied diligently from the very beginning and has disdained the aid of a "coach," may at the examination become confused by so many questions on so many different subjects in such a short space of time, and may make an

utter failure. Evidently an injustice has been done. This can be avoided by substituting, instead of this one all-comprehensive examination, several examinations coming at regular intervals throughout the academic course.

My object in writing this paper has been to give the English reader some idea of the scientific, *i. e.* the academic, training of a German law student. As I mentioned already at the beginning of my paper, there is also a four years' practical course before the young lawyer can be called to the Bar. It is not my purpose to discuss here this other side of legal education, since the burning question of legal training in England refers pre-eminently to the theoretical aspect.

In my opinion, in a country like Germany, where the whole law is codified and legal principles are furnished the lawyer in a "cut and dried" form, a thorough and comprehensive study of law is not by any means so necessary as in a country like England, where the bulk of the law is based upon precedent. An uncoded system of law can only be mastered by those whose scientific equipment is complete enough to enable them to cut a path through the tangled growth of enactment and precedent, and thus codify for themselves. Is such an adequate training provided for the English law student?

GUSTAV SCHIRRMESTER.

II.—ROMAN LAW IN ENGLISH DECISIONS.

WITHOUT going at length into the question, so much debated, of the direct influence of Roman law in England, it may be of some interest to offer a short historical account of the citation of Roman law texts in arguments and decisions on points of English law. Such citation appears most frequently, as might be expected, in

appeals from colonies where Roman or Roman-Dutch law is or was in force. A reference to the reports of the Judicial Committee will show that such citation is not infrequent in cases from South Africa, Ceylon, Guiana, Mauritius, and Malta.¹ These cases it is not proposed to touch, but to deal only with English decisions proper. As early as the thirteenth century the Courts begin to quote Roman law with more or less accuracy. The increasing use of Roman law led, as is well known, to protests by the Legislature. It does not dominate the Courts to the same extent as it does the text-books, but still appears often enough to make one think that the judges of even the Common law Courts had some knowledge, possibly often superficial, of the system, and perhaps more often derived indirectly than directly, from the English text-books rather than from the *Corpus Juris*. This no doubt explains why they must often have been misled, for there are numerous instances of quite impossible phrases—impossible, that is, in England,—used by these writers. Some of the more striking are worth mention. Glanvill says that in default of brothers to succeed *vocandæ sunt sorores* (vii, 4), using the prætorian technical term which corresponds with nothing in English procedure. Bracton affords many examples. The substitutionary phrase *Si Titius heres non fit tu heres esto* (19a), is a good one. He also uses the terms *actio legis Aquiliæ* (103a), *actio furti* (150b), and *intentio* in the definition of a writ (413b). *Stipulatio per scripturam* (99b), is an adaptation to English circumstances of a Roman technical term in a sense which it could never have borne in Roman law. *Fuste possidet qui*

¹ Among numerous instances, some of the best are *Macdonald v. Bell*, 3 Moo. P. C. 315 (appropriation of payments); *MacKellar v. Bond*, 9 App. Cas. 715 (Sc. *Velleianum* in Natal); *Galliers v. Rycroft*, [1901], A. C. 130 (fideicommissary substitution). The latest reported seems to be *Kieffer v. Le Séminaire de Québec* [1903], A. C. 85 (servitude). In *Gera v. Ciantar*, 12 App. Cas. 557, the decision turns on Novel lxxxix. It is not very common to find the Novels as authoritative.

prætoris auctore possidet (196a), could never have been law in England. He gives *theatra* as instances of *pública tenementa* (207b), and *communia tenementa* (208a). But, as Pollock and Maitland observe,¹ the English borough of the thirteenth century could hardly have had municipal theatres. Britton and Fleta err in the same way. Britton's *actio familiæ erciscundæ* (iii, 7, 1), is quite un-English, and the author is driven to explain it by regarding *erciscundæ* or *Herciscundæ* as a proper name, the mythical plaintiff or defendant in whose case the procedure was first used.² Two instances of misunderstanding or carelessness in Fleta may be mentioned. He uses the term *hereditas jacens* and calls it *res nullius* (iii, 1 and 7). His example of a condition in a conditional gift is *Si Titius consul factus fuerit* (iii, 9).

The writer through whom the Roman law reached the English bench was in most cases Bracton. A good instance is *Coggs v. Bernard*, Ld. Raym. 909, where the Roman law is the law of Bracton. As time went on, the authority of Bracton became weakened. On several occasions the courts have declined to treat him as anything more than illustrative. He is no authority unless he can be confirmed by a decision.³

Original texts of the *Corpus Juris*⁴ are on a somewhat higher plane. No doubt at one time they stood even higher. A modern judge would hardly say, as a Chief Justice of the Common Pleas is reported to have said, in 1332, "*Que répondez-vous à la ley empiel (impérial) donques sur quel ley de terre est fondu*?"⁵ Nor would he join in the eulogy of

¹ I, 479.

² Coke is a little nearer the truth, but narrows the scope of the action too much by regarding it as one of partition among coparceners (Co. Litt. 164b).

³ *Blundell v. Catterall*, 2 B. & A. 268. See other cases in Markby, *Elements of Law*, sect. 89, note.

⁴ To have any weight the *Corpus Juris* must be quoted. There appear to be few or no attempts to cite such compilations as the *Regule* of Ulpian or the *Sententia* of Paulus.

⁵ Year Book, 5 Edw. II, 148.

Roman law at the expense of English, so carefully laboured by Sir R. Wiseman.¹ The value of Roman law as a guide to judicial opinion at the present day rests on the dicta in three cases. In 1843 Tindal, C.J., summarised it thus: "The Roman law forms no rule binding in itself on the subjects of these realms, but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it prove to be supported by that law—the fruit of the researches of the most learned men, the collective wisdom of ages, the groundwork of the Municipal law of most of the countries of Europe" (*Acton v. Blundell*, 12 M. & W. 324). In a case of excepted perils in 1872, Willes, J., spoke of "the Civil law which, though it be not recognised as *jus commune*, either here or abroad, in mercantile or maritime affairs, has been the source of many valuable rules," (*Notara v. Henderson*, L. R., 7 Q. B. 225). The latest dictum on the subject is extracted from a judgment of the Earl of Halsbury, L.C., in 1901. "There are parts of the Roman law which undoubtedly we have made part of our law, and they are binding on us, not because they are part of the Roman law, but because they have become part of our law.² There are some countries which have made the Roman law their own, but in this country we have never adopted in such a wholesale fashion, Our law differs in most important respects from the Roman law, and to quote the latter as an authority we must show that it has become part of our jurisprudence" (*Keighley, Maxted & Co. v. Durant*, [1901], A.C. 245). The practical effect of these judicial statements appears to be to place the

¹ *Law of Laws* (1686).

² This quite accords with the judgment of Lord Blackburn in *Dalton v. Angus*, 6 App. Cas. 827, where he says that the *nec vi nec clam* of Roman law "is so far adopted in English law that no prescriptive right can be acquired where there is any concealment."

Corpus Juris in the same position as that attributed to Bracton in *Blundell v. Catterall*. It is illustrative, not authoritative. As an illustration it is still cited frequently, though possibly not as frequently as in the days of Hardwicke or Mansfield. In some cases only the writings of civilians or commentators are noticed,¹ but on the whole, at any rate in modern times, it is more usual to base arguments on the original texts themselves. The texts are not always followed.²

The earliest citation in anything in the nature of a reported case appears to be a somewhat vague reference in Bracton's *Note Book*, 1260, a case decided in 1237, concerning partition among coparceners of the estate of John, Earl of Chester. The Court there says that there is no authority for a proposed course of procedure, *nec in jure scripto aliquem talem casum viderunt*. Professor Maitland, the learned editor, reads the *jus scriptum* as Roman law. The Year Books are not prolific, and the citations are almost always of maxims, sometimes verbally correct, sometimes garbled and altered to suit circumstances, as was so frequently done by English judges and text-writers.³ The earliest definite reference seems to be 20 Edw. I, p. 24, where the phrase *res inter alios acta* is evidently used as an exotic term. In 21 Edw. I, p. 72, one of the judges quotes the Latin translation of Porphyrius' definition of *accidens*. But this is logical rather than legal. Selden, in his *Dissertatio ad Fletam*, 529, says that Roman law was cited in 10 Edw. II, 133b, and 12 Edw. II, 151a and 156a, as illustrative of the difference between natural and civil death. They seem to have been cited from a MS. in the Inner Temple Library, and cannot be traced in the Year Books of the date.⁴ In

¹ As in *Luke v. Lyde*, 2 Burr. 883; *The Twee Gebroeders*, 3 C. Rob. 336; *Byrne v. Van Tienhoven*, 5 C. P. D. 344.

² An example is *Clayton's Case*, 1 Mer. 585 (appropriation of payments).

³ See L. M. & R., August, 1895, p. 283; Bacon, Maxims, Preface.

⁴ The case of the *Prior of Wallingford* (Ed. 1678), p. 351, is the only one in point, and the report in that edition does not bear out Selden's statement as to the citation of Roman law. The other references are to the Rolls Series.

30 Edw. I, p. 129, *ratihabitio retrotrahitur et mandato comparatur* appears, and in 12 Edw. III, p. 626, *malitia supplet aetatem*.¹ The decisions in the Year Books were possibly influenced by Bracton, Fleta and Britton, but these writers are nowhere directly cited.

At a period subsequent to the Year Books the use of Roman law appears somewhat sparingly in the older reports. The most interesting is a statement of Saunders, J., in 1553, *Buckley v. Rice Thomas*, Plowd. 124, that "in 7 Hen. VI, in a case that came before the judges on the Civil law, they were well content to hear Huls, who was a bachelor of both laws, argue and discourse upon logic and upon the difference between *compulsione præcisa et causativa*, as men that were not above being instructed and made wiser by him." In the same case the etymology of *licet* is discussed. A note to the well-known case of *Sharington v. Strotton*, Plowd. 298 (1563), defines *nudum pactum* and *nuda pactio*. In *The Case of Mines*, Plowd. 336 (1568), the reporter states that Weston, J., "said that there is a text in the Civil law to this effect, viz., that by the negligence or poverty of the proprietor of the soil *possunt fodi omnia metalla in alieno solo, invito domino, quia utile est reipublicæ, et aliter non* ;"² to this Saunders, C.B., said that the same law says *quod optima legum interpret est consuetudo*."³ At a little later date (1612), Sir John Davis, in *Le Case de Commenda*, Reports, 71, mentions the Twelve Tables, but only to say that they were imported from Greece.

The position of Coke towards Roman law is not easy to determine, as it is doubtful how far either he or the judges whom he reports had any knowledge of Roman texts at

¹ Cod. ii, 43, 3.

² This does not appear in the text of the *Corpus Juris*. The nearest approach to it seems to be Cod. Th. XIX, 1, 1.

³ Dig. i, 3, 37. Saunders, C.B., has it right. This is more than can be said for the attempts at the maxim made by Coke, 2 Inst. 282, and by Lord Brougham in *Dunbar v. Duchess of Roxburghe*, 3 C. & F. 354.

first hand. There are few direct allusions to Roman law. One is in *Caudrey's Case*, 5 Rep. i, "for as the Romans fetching divers laws from Athens, yet being approved and allowed by the state there, called them notwithstanding *Jus Civile Romanorum*," &c. Both he and his judges are stronger in the Roman poets, who are frequently cited, and in Roman history. For instance, the persecutions of the Christians under Julian and Diocletian are twice alluded to.¹ Most of the Roman law is in the form of maxims; to them will apply what has been already said as to the Year Books. Take, for instance, *hereditas est successio in universum jus quod defunctus antecessor habuit*, cited in *Calvin's Case*, 7 Rep. 10, from Bracton, 62b, Bracton having added the word *antecessor* to the original in the Digest.² Sometimes Coke varies even in the same report, e. g., both *expedit* and *interest reipublicæ ut finis sit litium* appear in *Ferrer's Case*, 6 Rep. 7. No reference is ever given to the original texts of Roman law.

Since the Elizabethan period there has been a stream, thin but continuous, of Roman law texts more or less influencing English judgments. Some of the most important, in addition to those already noticed, may be shortly mentioned. In Equity we have the well-known leading cases of *Hooley v. Hatton*, 1 Bro. C. C. 390 (satisfaction), and *Earl of Chesterfield v. Janssen*, 2 Ves. 125 (*Sc. Macedonianum*), and in addition *Blasson v. Blasson*, 2 De G., J. & S. 665 (unborn child), *Howe v. Smith*, 27 Ch. D. 101 (*arrha*), *Dashwood v. Magniac* [1891], 3 Ch. 306 (*silva cædua*), *Mayor of Bradford v. Pickles* [1895], A. C. 587 (water rights), and *Jordeson v. Sutton Gas Co.* [1899], 2 Ch. 257 (right of support). In *Midland Ry. Co. v. Gribble* [1895], 2 Ch. 129, a case of suspension of easement, Wright, J. in his judgment stated that the only law directly in point was a paragraph from an opinion of Marcellus, in Dig. viii, 6, 13.

¹ *Bishop of Winchester's Case*, 2 Rep. 44; *Magdalen College Case*, 11 Rep. 70.

² Dig. i, 16, 24; 17, 62.

The Common law side supplies the investigator with a good many cases of the first importance, as the names will show. Among these may be named *Lane v. Cotton*, 12 Mod. 482 (carrier), *Moses v. Macferlan*, 2 Burr. 1005 (quasi-contract), *Mills v. Fowkes*, 5 Bing. N. C. 455 (appropriation of payments), *Blakemore v. Bristol and Exeter Ry. Co.*, 8 E. & B. 1035 (*commodatum*), *Embrey v. Owen*, 6 Ex. 371 (servitude), *Kennedy v. Broun*, 13 C. B., N. S., 677 (*honorarium*), *Chasemore v. Richards*, 7 H. L. C. 349 (water rights), *Taylor v. Caldwell*, 3 B. & S. 826 (*obligatio de certo corpore*), *Lee v. Jones*, 17 C. B., N. S., 482 (fraudulent misrepresentation),¹ *Nugent v. Smith*, 1 C. P. D. 423 (act of God), *Foster v. Wright*, 4 C. P. D. 416 (alluvion), *Burton v. English*, 12 Q. B. D. 220, and *Ruabon Steamship Co. v. London Assurance*, [1900], A. C. 3 (*lex Rhodia*),² *Dalton v. Angus*, 6 App. Cas. 740 (right of support), *Bentley v. Vilnont*, 12 App. Cas. 471 (*brevi manu* delivery), *Cochrane v. Moore*, 25 Q. B. D. 57 (delivery of gift), *Smith v. Baker* [1891], A. C. 355 (*volenti non fit injuria*).³

On the Admiralty, Divorce, and Ecclesiastical side there is perhaps not as much citation as one might look for, but the whole atmosphere is more Roman than in the Equity and Common law Courts. There is unexpectedly little in Lord Stowell's decisions. He is more at home with Bartolus and Farinaccius. He alludes to Roman law generally in *The Aquila*, 1 C. Rob. 37 (wreck), and in *Forster v. Forster*, 1 Consist. Rep. 144, he says that the canonical doctrine of *compensatio criminum*⁴ in matrimonial cases is

¹ In this case a good deal of use was made of Cicero, *De Officiis*.

² There is a difference of judicial opinion as to whether the *Lex Rhodia* is the basis of the English law of general average. See the judgment of Earl of Halsbury, L. C., in this case.

³ So cited by Lord Watson, who derives it from the Civil law. It is another example of inaccurate citation. The original is *nulla injuria est qua in volentem fiat*, Dig. xlvii, 10, 1, 5.

⁴ The phrase used in the Digest is *compensatio mutui criminis*.

derived from Dig. xxiv, 3, 39, and xlviii, 5, 13, 5.¹ Among Ecclesiastical cases, *Evans v. Evans*, 1 Robertson 165, is the most notable. There the sufficiency of one witness to prove a fact was upheld against the texts of Roman and Canon law.

In the United States, perhaps the most notable case was the great Rhode Island constitutional decision, *Trevett v. Weeden* (1786), the earliest in which a State law was held unconstitutional. There the Roman principles of *mandatum* were applied to the powers of a State Legislature.² In general, except perhaps in the Louisiana Courts before the recent constitutional amendments in that State, the American judges seem less inclined than their English colleagues to cite Roman law authorities, though both Story and Kent, to mention no other names, were learned in the Roman system. Cases of interest in which it has been done, are *Bright v. Boyd*, 1 Story 478 (compensation for improvements), *Webb v. Portland Manufacturing Co.*, 3 Sumner 189, *Louisville Ry. Co. v. Litson*, 7 Howard 523 (where the maxim *quod contra rationem juris receptum est non est producendum in consequentia*³ is discussed), *Rucher v. Conyngham*, 2 Peters' Adm. 307 (the position of *exercitor navis* and *navicularius*). The increasing study of Roman law in the universities of the United States may perhaps lead to a greater employment of it in the Courts of the future.

JAMES WILLIAMS.

¹ In *Hope v. Hope*, 1 S. & T. 94, the Canon law maxim, *paria crimina compensatione mutua delentur*, was finally rejected by Sir C. Cresswell as contrary to the spirit of English law.

² See Brinton Coxe, *Essay on the Judicial Power*, p. 119.

³ Dig. 1, 17, 141.

III.—TRADE REGULATIONS IN THE MIDDLE AGES.

ONE of the chief dangers to be apprehended from trade combinations or trusts is, that the members, having eliminated competition, may not be content with fair and reasonable prices for their goods, but will exploit their practical monopoly to the injury of the public.¹

From this point of view the evil is not a new one, and there are many statutes and regulations, now obsolete and repealed, which were passed in order to remedy it. These statutes, however, date from a time when the gigantic combinations, with which we are now familiar, were not even dreamt of, and would indeed have been impossible. It is only with and by means of rapid transit, communication, and production, that the more important of these combinations have become feasible; conditions which did not obtain in the old days of statutory interference with prices. In one respect, however, there is a marked similarity between the present conditions of trade and those existing in mediæval times. Under modern conditions, owing to our facilities for communication and transport, it has become possible for a combine to control the production and price, and to obtain a practical monopoly of many articles of commerce, while formerly, owing to the very absence of these conditions, and to the small area from which supplies could be drawn, a forestaller or ingrosser could, with comparative ease, get into his hands the whole of the available local supply of an article, and retail it at such prices, reasonable or unreasonable, as he might think fit to demand. Hence, in spite of the altered conditions, it is by no means uninformative to endeavour to realise the economic standpoint from which our ancestors viewed the subject, and to trace their attempts to combat the evils which resulted,

¹ See *The Law Magazine and Review*, 1903, pp. 302 and 306.

or were supposed to result, from the operations of the forestaller, the ingrosser, and the regrator. :

In mediæval times it seems to have been assumed that everything had a "just or reasonable" price, which could be easily and accurately ascertained; a price dependent upon the normal cost of production, and not upon the temporary wants of the purchaser or the greed of the vendor. Industry was not regulated solely by self-interest, nor was it carried on upon the same independent, irresponsible footing as at the present time.

The various trades were all more or less regulated and organized, at first on a local, and afterwards on a national basis. Guilds, merchant companies, and livery companies had each in turn, and in their respective spheres, a share in passing and enforcing these regulations. It was comparatively easy for the earlier of these bodies, familiar as they were with the conditions of production and the status and requirements of each member of the industrial group, to fix a scale of prices which would afford such a remuneration to the craftsman and others, as would enable them to live according to a well-recognized standard of comfort. Capital, in its modern sense, was of little use to the mediæval craftsman. His position in the world was clearly defined, and he had but small opportunity, even if he had any desire, to push himself into another rank of life. He was not supposed to labour for *gain*, but merely to enable himself and his family to live in the same degree of comfort as his fellow-craftsmen. If he asked such a price for his goods as would enable him to do this, the price was a just one; were he to charge more he was considered greedy and covetous, and to be taking undue advantage of the necessities of his neighbours.¹

¹ See S. Thomas Aquinas' *Summa Theologica*, *Secunda Secunda*, *questio* 77, art. 4; Cunningham's *Growth of English Industry and Commerce*, p. 250; and Ashley's *Economic History and Theory*, Part I, pp. 126 and 140.

The trading and non-manufacturing classes, however, presented a more difficult problem to the mediæval moralists and legislators, as they produced nothing and seemed to add nothing to the value of the goods dealt in. Hence the early Christian teachers considered it immoral to buy a thing, and sell it again at a profit, unless in the meantime the merchant had worked the article into something of a different nature, and so enhanced its value.

At a later period, trade was considered justifiable if it were carried on for the purpose of obtaining the necessities of life, or for charity, but all trading for gain, all speculative transactions, all attempts to create monopolies, or to influence the natural supply and demand, were condemned. "*Negotiari prompter res necessarias vitæ consequendas omnibus licet; propter lucrum vero, nisi id sit ordinatum ad aliquem honestum finem, negotiari ex se est turpe.*"¹

The early attempts to regulate prices and suppress monopolies are mainly due to this mediæval conception of a just or reasonable price. At a later period, when the regulation of trade came to be considered a matter of national importance, we find that any transaction the tendency of which was supposed to unduly enhance the price of any article, but more especially of victuals, was regarded as illegal, not only on the grounds above indicated, but also as being contrary to public policy. Prices of manufactured goods were as a rule fixed by the Guilds, but during the period of the Tudors this system seems to have given rise to considerable dissatisfaction, and an Act² was passed forbidding any master, warden, fellowship of craft, or ruler of Guild, to make any act or ordinances, unless the same were first examined and approved by the Chancellor, Treasurer, or certain Justices. It would seem by the preamble to this statute that these bodies had made

¹ *Summa Theologica, Secunda Secunda, questio 77, art. 4.*

² 19 Hen. VII, c. 7.

unlawful and unreasonable ordinances, "as well in prices of wares" as other things. This function of fixing prices was, however, sometimes assumed by the central authority. Thus, by the Assize of Bread formulated in the reign of Hen. II, the price of bread was fixed on a sliding scale according to the price of corn. King John, by the Assize of Wine, fixed the price of certain wines. By the *Judicium Pillaræ*¹ the prices of bread and of ale were fixed on a sliding scale. The Assize of Wine (1310) not only provided that wine sold by retail must come up to a certain standard, but also fixed the price at which the various qualities were to be sold. The system of fixing the price of manufactured goods was, however, inapplicable to corn and live and dead stock, the production and price of which necessarily varied according to the seasons, the success or failure of the harvest, etc., etc. This difficulty is recognised in the preamble to 13 Rich. II, c. 8, where it is recited that "man cannot put the price of corn and other victuals in certain." The mediæval legislator seems to have been content to allow the price of corn to be settled by competition in the open market, provided such competition was fair and above board. The regulation of the price of other victuals, such as meat, etc., was generally left to the municipal authorities. When the Legislature interfered in such matters, it was rather to ensure that victuallers should not charge *unreasonable* prices, than to fix the exact price at which they should sell their goods. By 4 Edw. III, c. 12, it is enacted "that because there be more tavernes, than "were wont to be, selling as well corrupt wines as whole-
 "some, and have sold the galon at such price as they
 "themselves would (*ont vendu le galon tul pris come ils*
"mesures ont volu), because there is no punishment ordained
 "for them, as hath been for them that hath sold bread and
 "ale, to the great hurt of the people, it is accorded that a

¹ 51 Hen. III, st. 6.

“ cry shall be made that none be so hardy to sell wines but
 “ at a reasonable price, regarding the price that is at the
 “ ports from whence the wines come and the expenses as in
 “ carriage of the same from the said ports to the places
 “ where they are sold.” By 23 Edw. III, c. 6 (The Statute of Labourers), it is provided “that butchers, fish-
 “ mongers, regrators, hostellers, brewers, bakers, poulterers,
 “ and all other sellers of all manners of victuals shall be
 “ bound to sell the same victuals, for a reasonable price,
 “ having respect to the price that the same victuals be sold
 “ at the places adjoining, so that the same sellers have mode-
 “ rate gains and not excessive, reasonably to be required
 “ according to the distance of the place from whence the
 “ said victuals be carried.” The penalty imposed by the statute was twice the price obtained for the article. The Statute of Kilkenny¹ provided that prices should be assigned by the town magistrate to imported victuals in accordance with the first cost of the goods and the expense of transport.

A curious attempt to prevent herrings being sold at unreasonable prices is afforded by 35 Edw. III, which—after reciting “that because the hosts of our town of Great Yarmouth, which lodge the fishers coming there, with
 “ their herrings to sell in the time of the fair, will not suffer
 “ the said fishers to sell their herrings, but sell them at their
 “ own will, as dear as they will and give the fishers that
 “ pleaseth them” “and that many merchants
 “ coming to the fair do bargain for herrings and
 “ every one of them by malice and envy increase upon
 “ other, and if one proffer 10s. another will proffer 10s.
 “ more, and the third 10s. more and every one surmounteth
 “ the other in the bargain and such proffers extend to more
 “ than the price of the herrings upon which the fishers
 “ professed it to sell at the beginning”—enacts that herrings shall be sold openly and not privily, at such prices

¹ Quoted in Gross' *Gild Merchant*, 1, 136, m. 2.

as may be agreed between the buyers and sellers, and that no man shall increase upon the other during the bargain. This statute well illustrates the mediæval theory of a just or reasonable price, and the difficulties of carrying it out. The "hosts" of Great Yarmouth had not caught the fish, and were not entitled to buy up the supply to the detriment both of the fishermen and the public. On the other hand, if the fishermen sold, they should do so at a reasonable price, and were not entitled to any benefit arising from the fact that the demand happened to be greater than the supply. In other words, although the sale was to be open and public, the price was not to be determined by the higgling of the market. By 13 Rich. III, c. 8, victuallers are accorded "*reasonable gaigne solone la discretion et limitation des justices et nient plus.*"¹ 25 Hen. VIII, c. 2, affords another excellent example.

After reciting in the preamble that dearth, scarcity, good, cheap and plenty, makes it very hard and difficult to put any certain prices to cheese, butter, chickens, and other victuals which have been enhanced and raised by the greedy covetousness and appetites of the owner of such victuals, by ingrossing and regrating the same more than upon any reasonable or just ground or cause, to the great damage of the King's subjects, it is enacted that upon any complaint being made of any enhancing of prices of such victuals, without ground or cause reasonable, certain persons shall have power to set and tax reasonable prices of all such kinds of victuals, whether sold in gross or in retail. Statute 16 & 17 Car. II, c. 2, empowered the Justices of the Peace to fix the retail price of sea-coal brought into the Thames at such an amount as they should judge reasonable, allowing a competent profit to the retailer beyond the price paid by him to the importer. This Act is extended by 17 Geo. II, c. 35. Even so late as the year 1761² an Act of

¹ See, too, 31 Edw. III, c. 2; 37 Edw. III, c. 3; and 4 Hen. IV, c. 25.

² 2 Geo. III, c. 14.

Parliament was considered necessary in order to enable victuallers and others to advance the price of strong beer or ale to a "reasonable degree" without being liable to prosecution.

As the old system of organised industry fell into decay, owing to the competition of aliens and unfree craftsmen, the decline of the Guilds and merchant companies, the refusal of craftsmen to accept a fixed scale of wages, and other causes, an ever-increasing difficulty was felt, not only in ascertaining what was really the just and reasonable price for any given article, but also in compelling purchasers to pay such price when ascertained, with the result that competitive prices, which were originally confined to corn and food stuffs, gradually spread to other articles of commerce until they became almost universal. Our present railway and cab fares and gas and water rates are among the few surviving instances where prices are still regulated and not left to free competition. The change of ideas this brought about is well illustrated in Nicholas Bartons' *Discourse of Trade*. "There are," he says, "two ways by which the value of things are a little guessed at—by the price of the merchant and the price of the artificer . . . but the market is the best judge of value, for by the concourse of buyers and sellers the quantity of wares and the occasions for them, are best known. Things are just worth so much as they can be sold for."

It, however, by no means followed because prices could no longer be fixed by the Guild, the Municipality, or the Legislature, but depended on supply and demand, that they were to be left at the mercy of the successful speculator.¹ When competitive prices came into general use, and the attempt to fix a fair and reasonable price for all articles of commerce had to be abandoned, attention was directed toward endeavouring to ensure that the competitive

¹ See Cunningham, *ib.*, p. 230.

or market prices should depend on natural supply and demand.¹ An effort was made to bring the consumer into direct contact with the producer in the open market; to render competition public and above board, and to allow both prices and wages to find their natural level unaffected by speculators, middlemen, and others, who apparently enhanced prices without adding to values.

The necessity of safeguarding the community against the monopolist and the speculator seems, indeed, to have been recognized by the Roman law. Thus by the *lex Julia de Annona*² any person doing anything or entering into any combination to raise artificially the price of provisions was liable to a fine of 20 aurei. So, too, merchants and others were not allowed to fix a price for their merchandize and to bind themselves by agreement not to sell under that price, and forestallers (*dandinarei*) were prohibited from trading.³ The principle of the Common law on the subject seems to have been that a man in the possession of goods or produce was under no obligation to sell, and if he sold, was entitled to demand whatever price he thought fit,⁴ but that he had no right to intervene between other vendors and would be purchasers, and so interfere with what was supposed to be the natural laws of supply and demand. All such acts were indictable at Common law, whether or not they came within the definition of forestalling, ingrossing, or regrating. The law is stated by Coke⁵ in the widest possible terms. He says that it was resolved by all the justices that a merchant may bring goods within the realm and sell them in gross, but that no merchant may buy within the realm any victual or other merchandize in gross and sell the same in gross again, for then he is an ingrosser according to the nature of the

¹ See Erle's *Trade Unions*, p. 8.

² Dig. XLVIII, 12, 2, 2.

³ Dig. XLVII, 116. pr.

⁴ See the judgment of Lord Mansfield in *Eccle's Case*, 1 Leach 274.

⁵ 3rd Inst. 195.

word, "for that he buy in-grosse and sell in-grosse and may be convicted thereof at Common law as for an offence that is *malum in se*, for by this means the price of the victuals and other merchandize shall be enhanced to the grievance of the subject, for the more hands they pass through, the dearer they grow, for everyone thirsteth after gain, and if these things were lawful a riche man might ingrosse into his hands all a commodity, and sell the same at what price he will. And every practice or device by act, conspiracy, words, or newes, to enhance the price of victuals or other merchandize was punishable by law." So, too, in Hawkins' *Pleas of the Crown*,¹ it is laid down "that all endeavours whatsoever to enhance the common price of any merchandize, and all kinds of practices which have an apparent tendency thereto, whether by spreading false rumours, or by buying things in a market before the accustomed hour, or by buying and selling again the same thing in the same market, or by any such like devices, are highly criminal at Common law, and that all such offences anciently came under the general notion of forestalling, which included all kinds of offences of this nature. And surely there can be no attempt of this kind but must be looked upon as a high offence against the public; inasmuch as it apparently puts a check upon trade to the general inconvenience of the people, by putting it out of their power to supply themselves with a commodity without an unreasonable expense, which often proves extremely offensive to the poorer sort, and cannot but give great cause of complaint to the richest." Most of the reported cases deal with the offences of forestalling, ingrossing and regrating, but there are some few which fall outside their scope. Thus in *Lumbarde's Case*² a merchant, who was not guilty of any of these offences as subsequently defined, was convicted of

¹ 7th Ed., Vol. II, p. 317.

² 43 Ass.

attempting to enhance prices; see, too, the case of the *Chandlers of Norwich* (1300)¹. In 1636, the butchers of London were fined £300 for glutting the market to the impoverishment of several country farmers, "because it was of public concernment and consequence."² It is not very clear from the report whether the butchers had glutted the market in the ordinary course of business, or whether their object was similar to that of the shipowners in the *Mogul Steam Ship Case*; i.e., to force down prices in order to drive competitors out of the market. A few years afterwards (1641) action was taken against certain bakers, who had agreed to raise the price of bread.³ In 1698 leave was granted to file an information against several plate-button makers who had agreed among themselves not to sell under a certain rate.⁴ In the case of *R. v. Norris*,⁵ certain proprietors of salt works at Droitwich had bound themselves, under a penalty of £200, not to sell salt under a certain price. Lord Mansfield, on a motion for leave to file an information against the "combine," said—"If any agreement was made to fix the price of salt, or any necessary of life, by people dealing in that commodity, the Court would be glad to lay hold of an opportunity to show their sense of the crime, and that at whatever rate the price was fixed, high or low made no difference, for all such agreements were of bad consequence."⁶ It will be noticed that the majority of these cases relate to combinations between the members of a trade. Such combinations would necessarily be contrary to the principles of Common law above stated, since each member of the combine was in effect intervening between other vendors and the public, and so interfering

¹ Quoted in *Pollock on Contracts*, 6th Ed., p. 341.

² *Midwinter v. Scroggs*, 1 Keb. 656.

³ See West's *Symbolæographic*, II, p. 103.

⁴ 12 Mod. Cas. 427.

⁵ 2 Ken. 301.

⁶ See, too, *R. v. Stirling*, 1 Siderfind 174.

with the normal market prices.¹ In *Cousins v. Smith*,² a typical trade combination came before Lord Eldon. Certain wholesale grocers, acting by a committee, had agreed to purchase all imported fruit with a view to keep up the price, and to prevent those who would not buy from them exclusively, from getting any supply at all. His Lordship said that though, according to legal definitions, this was neither forestalling, regrating, nor monopolizing, yet in consideration of a Court of Equity, it combined the mischief of all three. He described it as a conspiracy both against the fruit vendors and the world at large, enabling the Association to buy and sell at any price they might think fit. Fry, L.J.,³ treats this case as proceeding on the view of a Court of Equity of forestalling and regrating, but it is submitted that the decision is based on the wider Common law principle, as stated by Coke.

The Common law was, however, too vague to be altogether satisfactory, with the result that the more frequent of these practices, *i. e.*, forestalling, ingrossing and regrating, were dealt with and defined by the Legislature.

It would seem that the original meaning of the word to forestal was to "foresteal" or "waylay," and from this it came to mean laying in wait for merchants who were bringing goods to a town.⁴ The laws against forestallers appear to have been prompted by a desire to protect the small local markets, and to prevent traders purchasing up all available supplies of an article, and thus creating a monopoly before the public had a chance of competing.⁵

By 51 Hen. III, stat. 6, it is provided that jurors are to enquire concerning forestallers "that buy anything before " the due and accustomed hour against the good State and

¹ See *Eccle's Case*, *supra*, and the Articles of Inquest of 1354.

² 13 Ves. 542.

³ 23 Q. B. D. 598, at p. 632.

⁴ See Pollock and Maitland's *Hist. of English Law*, Vol. II, p. 468.

⁵ See Cunningham, *ib.*, Vol. II, p. 91.

“ Weal of this Town and market, or that pass out of the
 “ Town to meet such things as come to the market, to the
 “ intent that they may sell the same in the Town more dear,
 “ to regrators that utter it more dear than they would that
 “ bought it, in case that they had come to the market.”

Until the reign of Edw. VI we got no clear definition of the crimes known as regrating and ingrossing, and it is very probable that in early times very little distinction was made between them and forestalling. Coke¹ says, “ We remember
 “ not to have heard this word ‘ingross’ in any Act of Parlia-
 “ ment, book, case, or record, but rarely before the Act of 5
 “ and 6 Edw. VI, . . . but in the ancient time both the
 “ ingrosser and regrater were comprehended under fore-
 “ staller.”

51 Hen. III, 6, above quoted, shows however that even at this early date the distinction between forestallers and regrators was recognized. The Statute of 5 & 6 Edw. VI, c. 14, defined the offences of ingrossing and regrating, and further amplified the former definitions of forestalling. The preamble recites “ That albeit divers good statutes heretofore
 “ have been made against forestallers of merchandize and
 “ victuals, yet, that good laws and statutes against regrators
 “ and ingrossers of the same things have not been heretofore
 “ sufficiently made and provided and also for that it hath
 “ not been sufficiently known what persons should be taken
 “ for a forestaller, regrator, or ingrosser, the said Statutes
 “ have not taken good effect, according to the minds of the
 “ makers thereof.”

A forestaller is defined as being any person who (a) bought or contracted to buy any merchandize coming by land or by water towards any market or fair, to be sold in the same, or coming towards any city or port of the Realm from any ports beyond the sea to be sold ; or (b) made any bargain, or contract or promise, for the buying of the same, before it

¹ 3rd Inst., p. 195.

should have arrived in the market, fair, city or port, ready to be sold; or (c) should make any motion by word, letter, message or otherwise, to any person for the enhancing of the price of the same; or (d) should dissuade any person coming to the market or fair from bringing there any of the things aforesaid.

The same statute defined a regrator as one who gets into his possession in any fair or market any corn, wine, fish, etc., or other dead victual whatsoever, that had been brought to the market or fair, and resells them there, or at another market within four miles; and an ingrosser as one who gets into his hands by buying, contracting, or promise taking (other than by demise, grant or lease of land or title), any corn growing in the fields, or any other corn, or any dead victual whatsoever, within the Realm of England, to the intent to sell the same again. There were, however, numerous exceptions to these sweeping provisions. Thus, by sect. 7 of the same Act, fishmongers, butchers, poulterers, and innkeepers, were allowed to buy (otherwise than by forestalling) and to sell again at reasonable prices by retail, and by the same section an exception was made in favour of licensed badgers, laders, kidders and carriers, who were allowed to buy corn, fish, butter and cheese, for the purposes of their trade. Common provision might also be made for any city, borough or town, and corn, oats, &c., could be ingrossed when they fell below a certain price.¹ In addition to the forfeiture of the goods, the punishment for forestalling, regrating or ingrossing, was for the first offence, two months' imprisonment; for the second, six months' imprisonment; and for the third the pillory and imprisonment during the King's pleasure. This is the last statute, with the exception of the repealing statutes, dealing generally with these offences. There are, however, many later statutes

¹ See section 13.

dealing with particular trades.¹ For example, 22 & 23 Car. II, c. 19, enacted that no jobber should buy any cattle, except swine and calves, within 80 miles of London, and no butcher was to sell to any other butcher. The last-mentioned statute does not appear to have effected its object, however, as the statute of 5 Anne, c. 34, after reciting in the preamble that, notwithstanding the said Act, there was a pernicious practice then in use for one butcher to buy a greater quantity of fat cattle or sheep than he could vend, unless by selling them again to other butchers, which reduces the number of buyers in Smithfield, and may be a great inconvenience both to the graziers and housekeepers by subjecting them to such price as they shall think fit to give or demand, proceeds to enact that no butcher within the cities of London or Westminster, or within ten miles thereof, shall sell to any other butcher, any fat cattle or sheep, dead or alive, upon pain of forfeiting the value of the same.

As, however, trade expanded and markets ceased to be dependent solely on local supplies, the restrictions on trade imposed by these statutes became both useless and vexatious.

Adam Smith, writing in 1768, expresses the opinion that the statute of 5 & 6 Edw. VI, "by prohibiting as much "as possible any middleman from coming in between the "grower and consumer, endeavoured to annihilate trade, of "which the free exercise is, not only the best palliation of "the inconvenience of a dearth, but the best preventative "of that calamity."

Four years after this an Act² was passed, which, after reciting that the restraints laid by the several statutes upon the dealings in corn, meal, flour, cattle, and sundry victuals,

¹ See 2 & 3 Phil. & Mar., c. 13; 13 Eliz., c. 25, sect. 21; 1 Jac. I, c. 22; 15 Car. II, c. 7, sect. 4; 31 Geo. II, c. 40, sect. 11.

² 12 Geo. III, c. 71.

by preventing free trade, have a tendency to discourage the growth and to enhance the price of the same, repeals the Act of 5 & 6 Edw. VI and all other Acts made for the better enforcement of the same, as being detrimental to the supply of the labouring and manufacturing poor of the kingdom. It will be noticed that this Act only repeals certain of the ancient statutes, and does not purport to alter the Common law on the subject. The result of this was, that forestallers and others still remained liable to prosecution, on the ground that they were guilty of offences at Common law. Toward the end of the 18th century, the corn factors were loudly denounced as the cause of the prevailing scarcity,¹ and prosecutions for forestalling, etc., became more frequent again.

In the case of *R. v. Waddington* an information was laid against a merchant for forestalling and ingrossing hops. Lord Kenyon laid it down that "if a number of rich persons are to buy up the whole or a considerable part of the produce from whence such supply is derived, in order to make their own private and exorbitant advantage of it to the public detriment, it will be found to be an evil of the greatest magnitude, and I am warranted in saying that it is a most heinous offence against religion and morality, and against the established laws of the country." Waddington was imprisoned and fined £500.

In 1800 a corn merchant of the name of Busby was indicted for regrating 30 quarters of oats.² He had purchased the oats in the market and resold them the same day at a profit of 2s. per quarter. Lord Kenyon, in his charge to the jury said, that "though in an evil hour all the Statutes, which had been existing about a century, were at one blow repealed, yet, thank God, the provisions of the Common

¹ See McCulloch, p. 237.

² 1 East, 143, 167.

³ See Peake's N. P. Cas. 189.

"law were not destroyed." The prisoner was convicted, but as some of the judges doubted whether the act for which the indictment was laid was really punishable at Common law, he was never brought up for judgment. Several other cases of similar prosecutions during this period are quoted in Chitty's *Criminal Law*.¹ After *Busby's Case*, the text-book writers of the period seem to have been of the opinion that a man could not be convicted of ingrossing or regrating unless there was an intention to injure the public, either by raising the price or selling again at an unreasonable profit.² The point was, however, never decided, as in 1844 an Act³ was passed which, after reciting that, notwithstanding the Act of 1772, persons still remained liable to be prosecuted at Common law for badgering, forestalling, ingrossing and regrating, enacted that these offences be utterly taken away and abolished, and that no information, indictment, etc., should lie either at Common law, or by virtue of a statute, against any person by reason of such supposed offences.

The same Act repealed the remaining statutes on the subject which had been left unrepealed by the Act of 1772, and which are stated to be in hindrance and in restraint of trade, but this repeal was accompanied by a proviso⁴ that nothing in the Act should be construed to apply to the offence of knowingly and fraudulently spreading, or conspiring to spread, any false rumour, with intent to enhance or decry the price of any goods or merchandize,⁵ or to the offence of preventing or endeavouring to prevent, by force or threats, any goods, etc. being brought to any fair or market.

¹ Vol. II, p. 534.

² See Blackstone, Vol. IV, p. 158; Comyns' *Dig.*, IV, p. 690, and Chitty's *Criminal Law*, II, p. 534.

³ 7 & 8 Vict., c. 24.

⁴ Sect. 4.

⁵ See *R. v. De Berenger*, 3 M. and S. 67; *R. v. Aspinall*, 1 Q. B. 730; and *Scott v. Brown*, 1892, 2 Q. B. 724.

The Statute Law Revision Act 1892 repealed the Act of 1844, as being obsolete and unnecessary, thereby closing for the present the history of legislative interference with operations of the kind referred to. As has been pointed out by Fry, L.J.,¹ a comparison of the operative part of the last-mentioned Act, with the saving proviso contained in sect. 4, goes far to draw the line between lawful and unlawful interference with the ordinary course of trade.

P. HOUGHTON BROWN.

IV.—THE ORIGIN AND HISTORY OF THE CHANCERY DIVISION.

CIVILISATION has in all ages been instrumental in effecting the expansion of legal systems. In a simple community, simple laws for most purposes suffice. But when once a people begins to expand and develop commercial activity, it is generally found that something more complicated and far reaching is necessary in order to meet its augmented requirements. As in Rome so in England, it was soon found that the simple demands of earlier days differed widely from the multitudinous ones of a more highly civilised state of society. But the two cases are not quite parallel. For Rome had in the XII Tables and the subsequent additions made to her law, a written system; whilst the Common law of England was an unwritten one. Both, however, eventually found that the simplest method of overcoming their difficulties, was to create an exalted and detached official, endued with sufficient power and prestige, not necessarily or nominally to repeal the existing law, but to mitigate its inflexibility and moderate its harshness, by infusing into it such precepts of morality as seemed to be pertinent. In Rome the Prætor performed this office, and

¹ 23 Q. B. D., p. 629.

in England the Chancellor. The two problems, however, were by no means equally simple. For the Prætor was wont annually to announce the principles by which he would be guided in administering justice, whilst the Chancellor could originally do no more than frame new writs for new requirements to be dealt with at Common law. It is true that the Common law of England was supposed to be founded on reason and equity; and that at first it was capable of expansion to meet most cases, and even to contain a suggestion of equity. But in time it came to be administered on rigid principles, by which rights could only be enforced or injuries redressed through set forms. Precedents grew up, which were practically as binding as legislative Acts; and in time the system became little else than a *lex scripta*. There was one great difference between the two. Roman equity was administered by the ordinary tribunals, whilst English equity was the achievement of an extraordinary Court. Again, the former was written law promulgated by the Prætor; whilst English equity was unwritten, and the subjects they dealt with were wholly different. But they had this in common. They were both unsystematic in form; and whilst neither affected to alter or over-ride the law, each succeeded in correcting and supplementing it, looking to the substance rather than to the form.

The origin of the Chancellor's name is obscure; but at any rate it is most ancient. It was known to the Courts of the Roman Emperors, and subsequently it passed to the Roman Church. Hence it happens that some Bishops even to this day have still their Chancellors. Until the reign of Henry VIII the Chancellor was nearly always an ecclesiastic, whose reward for successful service was generally a Bishopric, if he did not already possess one. He was the most dignified, if not the head, of the Royal Chaplains, the King's Confessor, and the chief of the scribes

who conducted his correspondence and generally assisted him in transacting State business. Thus it is that the Chancellor of early times has been described as a Secretary of State for all departments. He appears earlier in history than the Chief Justiciar, whom in a sense he subsequently succeeded. Edward the Confessor is the first English King who is reported to have possessed either a Chancellor or a great seal. Under the Norman Kings he was of much inferior rank to the Justiciar amongst the other great officers of state. The Justiciar, of course, came first; but the Constable, the Marshal, the Steward and the Chamberlain, all ranked before the Chancellor, whose eventual pre-eminence arose somewhat in this manner. In early times the King himself heard and decided such controversies as were brought before him. But these soon became too numerous for one man to deal with, and occupied too much of the time which was also needed for other State matters. So it became inevitable that judges should be appointed to do such work for him. But even then, there were still some cases which came before him. For, though he had delegated part of his authority to his judges, the Crown was by no means stripped of its inherent prerogatives. It consequently still boasted a certain residuary judicial power; in which case it was only natural that the Chancellor who, as well as being Secretary and Keeper of the Seal, was probably the most learned man in the royal entourage, should have taken a leading part in dealing with such matters. His office soon came to be called the Chancery; and its business the sealing and issuing of various documents—summonses to Parliament, charters, grants, patents, etc.—which emanated from the Crown, and which subsequently comprised the functions which became known as the Common law side of the Court of Chancery.

Many years elapsed before the Chancellor took the various burdens, afterwards identified with his name, undivided upon

his own shoulders; since the Council for long exercised a considerable though peculiar judicial authority. Their opportunities arose through the ordinary law Courts failing to give redress, either because one party happened to be so powerful that the judges could not conveniently thwart him, or because the grievance was one for which the rigid rules of the Common law provided no remedy. The reasons which caused the Chancellor to rise out of the Council are apparent. When the Curia Regis was still intact he affixed the great seal to writs and grants; and thus he possessed knowledge of all the King's doings in this respect. Moreover as a cleric he was consulted by the Sovereign in matters of conscience; and so by an easy transition he became the Council's most influential legal adviser, and the first law officer in the kingdom after the Justiciar's fall. In course of time it came to be understood in what cases the King would give relief through the medium of his Chancellor: and thenceforward it was inevitable that equitable relief should cease to be an act of grace and become a right; and, when once a right, that equity should become almost as systematised as law itself. Still this did not happen till long afterwards; for even in the days of Lord King (1725-33) equity was still spoken of as an act of grace.

Under Becket (Chancellor, 1155-62) the Chancellorship attained a much more prominent position; and it is said that at one time, during his tenure of office, no Justiciar was appointed. Apart from the strength and ability of the man, other things contributed to bring about this result. The external dignity of the post was enhanced by Henry II's exceptional favour, and the lavish magnificence in which Becket lived. In any case the commanding position which the Chancellor subsequently occupied is largely to be traced to his powerful influence. At one time it even appears from contemporary documents as if Becket held some kind of Court himself. But this did not become a regular custom

till a very much later period of our history, as for long the Chancellor merely administered equity in a ministerial and not a judicial capacity. His duties eventually became two-fold. He supplied writs to suitors who wished to litigate, and he decided a particular class of suits himself. Thus his attention was divided between the "hanniper" or hamper in which he kept his writs, and the "petty bag" which concerned his own business.

Edward I was wont to refer petitions asking for extraordinary relief to his Chancellor: and in 13 Edward I the statute of Westminster II authorised the granting of writs *in consimili casu*—that is to say, the clerks in Chancery were empowered to agree in making a writ to suit a case which required a remedy similar to one already existing. But even in the interpretation of this statute, a kind of *lex scripta* soon grew up. Still the Chancery could hardly yet be designated a Court of Justice, for it certainly did not try and determine causes: and neither the Chancellor nor his assistants performed strictly judicial duties. Issuing writs could hardly come under that classification, and nothing had as yet been heard of equitable jurisdiction.

Under Edward III the Chancery becomes yet more prominent. The Chancellor ceases to follow the King as a Court official; his office begins to acquire a more definite character as a distinct Court for relief in extraordinary cases; and when, towards the close of the reign, uses of land—not recognised by the Common law Courts, but considered by the Chancellors as binding upon the conscience—were introduced, the equity jurisdiction began to be established. The result came about in this manner. Everything Roman, including Roman law, seems at this epoch to have been looked on askance in England, the judges even prohibiting its citation in Court. But in dealing with the doctrine of trusts or *fidei commissa*, ecclesiastics, well versed in the Canon law, were clearly the most competent

persons available; and it is at least doubtful whether, had lawyers at this period been appointed Chancellors, the doctrine of uses—and indeed much of the equitable jurisdiction as we know it to-day—would ever have existed, since lawyers would naturally have regarded the law with considerable reverence. No doubt the ecclesiastical character of the Chancellors saved them from much secular control; and indeed it would hardly have been possible for any but clerics to have accomplished so much. Their decrees pertained more to the nature of awards than judgments, and in the main were bound down by no settled rules. However, in the course of time, both law and equity became almost equally fixed and positive systems; varying nevertheless, widely through difference of procedure, but eventually becoming in accord with each other, and generally following the equity maxim, that “equity follows the law.”

Under Richard II complaints against the extraordinary jurisdiction began to assume alarming proportions; and on more than one occasion the Commons attempted to extinguish it. But in this object they failed signally: so their subsequent efforts were merely directed towards attempting to regulate it. Although at this period the Chancellor's jurisdiction was still one with the council's, it became in a manner distinct and recognised when certain matters were by act specifically delegated to him. He was to make no order conflicting with the Common law; and it was also provided that no one should appear before him in a case where a remedy at law already existed. But in spite of this partial recognition of his authority, the struggle between law and equity continued; with the result that numerous petitions against Chancery encroachments upon the field of law are met with during the next three reigns, one of the principal grounds of complaint being against the vague summons by subpœna which showed no cause of action. Thus in 15 Hen. VI, c. 4, it was enacted that “no writ

of subpoena be granted henceforth until surety be found to satisfy the party so grieved, and vexed for his damages and expenses." The history of this writ of subpoena is obscure, though it has been credited to John de Waltham—afterwards Master of the Rolls—when a clerk in Chancery under Edward III. In spite of the outcry which was raised against it, no great change seems to have been effected thereby. Previously, writs seem to have threatened punishment for disobedience in indefinite terms; and so the only definite change introduced was the substitution of a definite for an indefinite penalty. Still, through the writ of subpoena the Court of Chancery, by ordering suitors to refrain or desist from exercising their ordinary rights, obtained virtual control over the doings of the Courts, without directly acting against the judges, and so wounding their susceptibilities..

Towards the close of the reign of Henry VI, the Chancellor's authority was greatly enhanced by the growth of that doctrine of uses which has already been alluded to. In this connection the Wars of the Roses appear to have exercised a singular and far-reaching effect on the future of equity. Spoils to the victors was the maxim which guided both Yorkists and Lancastrians during this unhappy epoch of our history. After nearly every battle, a considerable number of influential prisoners fell into the hands of the victorious side. The fate of these was generally pretty well assured. Summarily tried and as summarily convicted of high treason, all their lands were in consequence forfeited, and they themselves in most cases beheaded. Hence it became the practice of both sides to make some provision for their relatives, should any such untoward fate overtake them. Their lands were therefore often conveyed to some non-combatant before the commencement of a campaign. But the law took no cognisance of trusts; and thus it happened that when, after a man's conviction, his lands were found in

another's possession, the latter was held to be legal owner. If, however, the person so enfeoffed were honest, the relatives of the real owner reaped the benefit. But the converse might very well often have happened. Now the Chancellors did recognise trusts or uses; and thus it is that this important branch of our jurisprudence came to be administered by the Equity Courts, creating no estate in law or equity in the land itself, and not binding land but persons. So, too, it was in the case of mortgages, where the Chancellors, in a somewhat similar manner, recognised the equity of redemption.

It is as hard to determine at what precise period the Chancellor emancipated himself from the Council, as it is to say when the Common law Courts branched off from the Curia Regis; but probably both did so in much the same manner. A number of petitions addressed to the Chancellor have been preserved. But these do not help us much, as they might merely have been addressed to him as a great officer of State. Moreover, though generally addressed to him, they were sometimes also addressed to the King, and sometimes to the Council. Indeed, considering that the latter sat judicially until well within the fifteenth century, it is surprising that a larger number of petitions were not addressed to them.

From the earliest times until they were abolished by the Judicature Act, there is little variation in the form of Chancery bills. Up to Henry V, they were generally in French, and afterwards in English. The petition of course referred to some wrong, the remedy for which lay outside the Chancellor's ordinary administrative power. But again, it is difficult to say where the Chancellor's administrative functions ended and his judicial ones began, in the fourteenth and fifteenth centuries; and at what precise period he began to sit alone. We know that in 1377 he dealt with a bill on his own responsibility: and twelve years later it

appears to have been recognised that he already had that right, since "suits devant le Ghancellor ou le Conseil du Roy" are then alluded to by the Commons in a petition. It has even been said that his complete emancipation can be attributed to the reign of Richard II, when his jurisdiction was alluded to as on a par with that of the regular law Courts. But it is not clear whether the Council was included within this definition. So that evidence cannot be accepted as conclusive. What probably did happen was this. Originally the Council merely referred to the Chancellor points of law; and these eventually came to him as a matter of course. In any case, the two had not become entirely separate by the middle of the fifteenth century: although by then equity matters appear occasionally to have come before the Chancellor sitting alone. It is at any rate safe to say that his right to sit alone was finally and completely established under the Chancellorship of Wolsey (1515-29).

Unlike his predecessors and successors—whose occasional practice it was to call in the judges and sergeants to assist them in deciding points of law, just as in equity matters they sometimes called in the Master of the Rolls or other masters who knew the Roman law—Wolsey relied on his own judgment; and, though neither by training or education a lawyer, his free and vigorous application of equitable principles, earned for his Court considerable popularity and a consequent increase of business. It is interesting to recall that his biographer, Cavendish, has preserved to us, in Wolsey's own words, his conception of equity—"The King ought of his royal dignity and prerogative to mitigate the rigours of the law, where conscience hath the most force; therefore, in his royal palace of equal justice, he hath constitute a Chancellor, an officer to execute justice with clemency, where conscience is opposed by the rigour of the law. And therefore the Court of Chancery hath been here-

tofore commonly called the 'Court of Conscience'; because it hath jurisdiction to command the high ministers of the Common law to spare execution and judgement, where conscience hath most effect." One noticeable result of Wolsey's Chancellorship—and perhaps a tribute to the force of his character—was the special commission issued to the Master of the Rolls and others to hear and determine causes in Chancery committed to them by the Chancellor; and in this somewhat informal manner, the Master of the Rolls continued to do so for some 200 years, at any rate when the Chancellor was not sitting. The Mastership of the Rolls does not originally appear to have carried any judicial authority, although possibly in early years it may sometimes have done so.

Wolsey was succeeded by Sir Thomas More (1529-32), the first of the long series of great lawyers who have filled the Chancellorship. It had become evident in course of time that, as the Common law was becoming more systematised through the recording of precedents in the year books, equity must become more systematised to keep pace with it: and with the advent of an eminent lawyer like Sir Thomas More as Chancellor, a great stride was naturally made in that direction. No one of much note, from a legal point of view, followed Sir Thomas More until Sir Nicholas Bacon (1558-79) was appointed Lord Keeper by Elizabeth. That sovereign appears to have been reluctant to confer the higher dignity of Chancellor; and when the legality of the Lord Keeper's position was questioned, an Act (5 Eliz., c. 18) was passed, which conferred upon him the rights "belonging to the Lord Chancellor of England, as if for the time being he were the Lord Chancellor."

The next Chancellor who merits attention is Lord Ellesmere (1603-17), who was virtually the first of those whose decisions have been preserved, and who accomplished much towards settling the practice of his Court. It cannot,

however, be said that he placed matters on a settled basis, or that under him the binding force of precedent was fully established. On one occasion, at least, he made a special proviso that his decision should not be followed, although he frequently referred to precedents, and, when they could be found, generally followed them. Like so many of his successors, he added new doctrines, and afforded relief in cases which hitherto had not been considered as coming within the confines of equity. In his time the inevitable conflict between law and equity came to a head. It was only natural that the rise of the Chancellor's judicial authority should not have been effected without some friction with the law Courts. Still, friction was by no means continuous, since judges and serjeants were occasionally called in to assist the Chancellor. Under Edward IV the Common law judges had begun to realise that by too rigid an adherence to technical rules, they were playing into the willing hands of the Chancellors; and, amongst other achievements, they virtually repealed the statute *De donis* on their own authority—a judicial exploit far exceeding anything which the Chancellors had ventured upon. The ardour with which they pursued their course and upheld their dignity naturally brought them into occasional collision with the latter; and in a recorded case of 22 Edward IV, they advised a party to disobey a Chancery injunction, promising that if committal by the Chancellor should ensue they would effect discharge by *habeas corpus*.

The point at issue in Lord Ellesmere's celebrated controversy with Sir Edward Coke—the then Chief Justice of the King's Bench—was whether a Court of Equity could give relief against a judgment at law obtained by fraud. To such lengths did the dispute go, that Sir Edward Coke directed indictments to be preferred against all concerned—suitors, counsel, solicitors, and even a Master in Chancery—for having incurred a *præmunire* by questioning in a

Court of Equity a judgment at law; the *impasse* being only eventually relieved by reference to the King, who supported the Chancellor.

Lord Ellesmere was succeeded by Lord Verulam (1617-21)—often as erroneously termed Lord Bacon as his great Common law *confrère* is termed Lord Coke—who only reigned four years in equity, and who consequently had scarcely time to make much mark in that sphere: whilst Bishop Williams, his successor (1621-28)—the last ecclesiastic to hold the great seal—was too ignorant of the subject to do so.

On the other hand, Lord Coventry's tenure of office (1628-40) was a great land-mark. So much so that Lord Hardwicke has stated that the establishment of the general rules of equity can be assigned to his Lord Keepership. Nevertheless there still remained much for Lord Nottingham (1673-82) and his successors to accomplish. Generally speaking, it may be said that Lord Nottingham shares with Lord Hardwicke the honour of being the real founder of the modern rules of equity—a great achievement when one considers how narrow were the ideas which then still permeated the Law Courts, and how imperfect the views as to redress which still prevailed in equity. Before Lord Nottingham's time there had been little real system. There were no authoritative reports, and little beyond tradition existed as a guide. Things did not of course change at once; and each great Chancellor after him added new doctrines and principles. Still, after this epoch the Chancellor appears in a more modern light as a practical judge administering rights, rather than as a moralist considering questions from a philosophic standpoint. Lord Guildford (1682-5) followed, and then came Lord Jeffreys (1685-9).* But that even by this time the practice of the Court was not satisfactorily settled, is seen by the fact that cases, already heard by Lord Guildford, were reheard by Lord Jeffreys.

Little more of note occurred till the advent of Lord Hardwicke (1737-56), who of all Chancellors is generally considered the most able and learned, and during whose long tenure of office nearly all the great branches of equity were settled. He was wont to disclaim the power of legislating, sometimes following rules of which he personally disapproved. But one of his greatest achievements was the establishment of the guiding force of precedent, which before his time had not really been accomplished. His conception of equity, however, cannot be more tersely or pertinently described than in his own words—"Some general rules there ought to be, for otherwise the great inconvenience of the *jus vagum et incertum* will follow; but yet the Prætor must not be so absolutely and invariably bound by them as the judges are by the Common law."

Nevertheless, equity was not finally and completely bound down by precedent until the time of Lord Eldon (1801-27)—up to the close of whose Chancellorship it had been developed solely by judicial means. But this Chancellor's conception of equity can again be best appreciated by quoting his own words—"The doctrines of this Court ought to be as well settled and as uniform almost, as those of the Common law, laying down fixed principles, but taking care that they are applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed by each succeeding judge. Nothing would inflict on me greater pain than the recollection that I had done anything to justify the reproach that the equity of this Court varies as the Chancellor's foot."

Complaints against the procrastinating tendency of the Chancery had at various times been made since the days of Elizabeth; and under Lord Eldon things came to a head. Apart from the extreme conscientiousness which distinguished the career of Lord Eldon, and which often led

to unnecessary delays, the Court was weighed down by a mass of technicalities which impeded its action at every turn. The bulk of the reports, though not then of course as great as now, was nevertheless formidable; and whereas now, admirable text books and digests abound, there were few of these in the beginning of the last century. An army of useless and unnecessary officials added largely to the expenses of unfortunate suitors, and the volume of business had grown inordinately large; whilst the Chancellor's time was already fully occupied elsewhere by the exigencies of the public service. Thus in 1825 the appeals, pleas, causes, petitions, etc. before the Lord Chancellor, amounted to the enormous number of 1,577. In addition, it will be remembered that the Master of the Rolls—the Chancellor's deputy—did not sit whilst the latter was sitting. No wonder, then, that delays were continuous and considerable.

In 1826 a Commission sat under Lord Eldon. But the report did not go to the real root of the evil, and accordingly little was accomplished. It is true that in 1813 a Vice-Chancellor had been appointed to relieve the pressure; but it was not till 1833 that any drastic measures of reform were undertaken. By 3 & 4 Will. IV, c. 94, the hours of business were revised; the Chancellor empowered to make rules for simplifying and settling the practice of the Court; and some unnecessary posts, such as the Master of the Report Office, entering clerks and clerk of the exceptions, abolished. In 1841, when the equity business which still survived in the Court of Exchequer was transferred to the Chancery, two more Vice-Chancellors were created; and in 1851 two Lords Justices of Appeal in Chancery were created, to hear appeals immediately from the Master of the Rolls and the Vice-Chancellors, a duty which previously had rested solely upon the Chancellor's shoulders, from whom again appeal had, since the reign of Charles II, lain to the House of Lords.

In 1852 equity judges were empowered to decide points of law which arose in their Courts, instead of being obliged to refer them to the law Courts; and by the Judicature Act of 1873 all the Courts were united and consolidated in one Supreme Court of Judicature in England, divided into a High Court of Justice and a Court of Appeal, and into the latter the Court of Chancery Appeal was merged. The old Court of Chancery became the Chancery Division of the High Court; and thenceforward actions, which hitherto had been the sole province of the law Courts, could be brought in it. It became then in effect neither a Court of law nor of equity, but a Court of complete jurisdiction. Still, in practice, the new order of things made little difference, since to the Chancery side was allotted the bulk of what fell to its share before the Act, although equity could also be administered in the Common law Courts. Thus the administration of the estates of deceased persons; partnership questions; the redemption or foreclosure of mortgages; the raising of portions or other charges on land; the sale and distribution of property subject to lien or charge; the execution of trusts; the rectification, setting aside or cancellation of deeds, etc.; the specific performance of contracts; the partition or sale of real estate; and the wardship of infants, were specifically assigned to it.

It is true that equity is no longer a separate system; but for purposes of convenience it is still chiefly so, although not now solely administered in the Chancery Division. It is, however, yet studied by a portion of the Bar who make it their special business, and from whose ranks the equity judges are chosen. The Chancellor and the Master of the Rolls no longer sit as judges of first instance, the principal judicial duty of the former being now to preside over appeal cases in the House of Lords, and occasionally to sit in the Court of Appeal, of which he is an ex-officio member. Above all, the long struggle between law and equity has at

last ended with the triumph of the latter; since by sect. 25 of the Judicature Act it is provided that where the rules of equity and of law conflict, the rules of equity shall invariably prevail.

ERASMUS DARWIN PARKER.

V.—BLOCKADE AND CONTRABAND: LAW AND PRACTICES OF NATIONS IN RECENT TIMES.

UPON the outbreak of hostilities between opposing States, those opposing States are *ipso facto* placed under certain liabilities and given certain rights in relation to all other States taking no part in the hostilities and their subjects. Borrowing an analogy from private jurisprudence, it may be stated that a State on the infringement of any of its rights has *jus in personam* against the State infringing, for the infringement of which right if it be of any magnitude restitution will be sought by means of war, and *jus in rem* against all other persons, not, within certain limits, to interfere with it in its recovery of compensation or in the conduct of any war undertaken with that object. Each non-combatant State (who is termed a “neutral”) has *jus in personam* against each of the opposing States (who are termed “belligerents”) to compel him to so regulate his conduct of the war as not, within certain limits, to prejudice the neutral. These rights and liabilities so possessed and borne by neutrals and belligerents respectively are:—

- (1) Duty on the part of the neutral (with corresponding right in favour of each belligerent) not to render any assistance to one belligerent to the prejudice of the other; and
- (2) Duty on the part of each belligerent to respect the sovereignty of every neutral.

The duties mentioned under (1) may be infringed by the neutral either by means of an act, *i. e.*, the rendering of active assistance; or a forbearance, *e. g.*, suffering its territory to be used as a base for belligerent operations. Amongst other modes of rendering active assistance to a belligerent, and which are therefore infringements of the duties contained under (1), are carrying on a commerce with him in the sale of goods: (A) which will assist him in his conduct of the war (which goods are termed "contraband"); or (B) at a place which the other belligerent has so surrounded as to prevent anyone holding communication with its inhabitants (which surrounding is called a "blockade").

Since it is a general rule that trading with a belligerent is permissible, and since the doctrines of contraband and blockade are exceptions to that general rule, we should expect to find and we do find differences more or less marked in the law and practice observed by nations with respect to these doctrines. And in dealing with these differences it may be more convenient to treat of them under their separate heads. And first as to that exception from the general rule above mentioned—that all trading with the enemy is permissible—prohibiting trade or communication with a place which one of the belligerents has placed under a state of blockade.

Blockade is the obstruction by one belligerent of passage to or from a place in the occupation of the other belligerent by land or sea. Its object, as defined by Sir R. J. Phillimore, is to cut off all communications in the nature of commerce with the place obstructed. Since, however, it would in most cases be a practical impossibility for a neutral to attempt to hold communication with a besieged inland town, blockade for the purposes of International law consists only in the interception of access by sea to the place the passage to or from which is so obstructed.

The conditions necessary to the due institution and main-

tenance of a blockade, and to insure the liability of any neutral for a breach, are as follows:—

- (1) The belligerent must intend to institute it as a distinct and substantive measure of war, and his intention must have been brought to the knowledge of the neutrals affected :
- (2) It must have been instituted under sufficient authority :
- (3) It must be maintained by a sufficient and properly disposed force.

Although it may be stated of these rules that in theory they are universal in their acceptance by those concerned in war, yet they vary greatly in the method of their application.

The first point whereon any appreciable difference of opinion and practice has existed in recent times is upon the question of the knowledge of the neutral of the existence of the state of blockade. And hereon considerable difference has been adopted between two great schools of thought—that of England and America on the one hand, and that of France, Italy, Spain, and Sweden on the other. According to the English and American theory, blockades are for this purpose divided into two classes, viz.: blockades *de facto*, without proclamation, and notified blockades. In the former case no vessel incurs liability unless she commits a breach conscious of the existence of the blockade, that is to say, the *onus* will be on the belligerent to prove the knowledge of the neutral, save in the case where such *de facto* blockade has existed for some considerable time, when a presumption of knowledge may be drawn from its notoriety. This is the principle which was laid down by the Judicial Committee in the case of *The Franciska, Northcote v. Douglas* (8 State Trials, N. S., 350), wherein it was held that a vessel cannot be condemned for breach of a *de facto* blockade unless the port for which she was sailing

was known by her master or owner to be in a state of blockade. And the necessity for this warning will be obvious when it is pointed out that, in the case where it is necessary, there would be in its absence no overt act showing the intention of the belligerent to treat the port in question as subject to a blockade of his institution, and that, if the warning were dispensed with, it might be open to a belligerent to take advantage of his men-of-war having been in close proximity to a certain place to seize neutral vessels making for such place, under the plea that his men-of-war were engaged in a *de facto* blockade, thus penalising the neutral "*ex post facto*." As was also laid down in the case of *The Franciska*, notoriety of a *de facto* blockade may be evidence of knowledge of it, but in order to make it conclusive evidence the facts which are notorious must appear to be such as to leave no reasonable doubt as to the existence of the blockade and to indicate its real *de facto* limits. In the case of notified blockades, notification of the impending blockade being given to neutrals by general proclamation, and a reasonable time being allowed for such notification to take effect, all neutral vessels are deemed to be affected with notice, and the mere sailing with an intent to break the blockade will be sufficient to warrant condemnation, for a neutral is bound to shape his conduct upon a presumption that a place subject to a blockade at the commencement of a proposed voyage thereto will continue to be so subject up to its termination, and thus be and remain a prohibited destination for the neutral.

But according to the French and Continental theory, all distinction between blockades *de facto* and those with proclamations on this point being disregarded, the neutral is not bound by any such presumption of continuance; on the contrary, he is permitted to ignore any knowledge acquired by him at any time before he can experimentally test the existence of the blockade on the place subjected to it.

In practice the English and American school, although making notification by proclamation their chief, and considering it the most convenient mode of affecting a neutral trader with knowledge of the existence of the blockade, do not confine themselves exclusively to this method. The strictness of the theory that if a neutral sail from a place at which the fact of the blockade is so notorious, such blockade having been duly proclaimed, that ignorance of its existence is impossible, having for its destination the blockaded port, confiscation may take place without warning, is modified in practice by some sort of notification being given. But when a neutral sails before proclamation has been made, or approaches a port closed by a merely *de facto* blockade, the existence of which for some reason has not been diplomatically notified, knowledge is not presumed, and in such case the vessel, being intercepted, is turned back with a notice indorsed on its papers similar to that required under French usage below mentioned. In practice also the presumption of continuance, which in strict theory is a *presumptio juris et de jure*, is modified into a *presumptio juris*, and as such may be weakened or rebutted when a vessel sails from a port a great distance away from the blockaded place, but only if, as the result of an enquiry into its conduct, it appears to have been its intention not to attempt to enter, if on arrival the port were still blockaded, and such absence of fraudulent intention should be evidenced by enquiry having been made at intermediate ports as to the state of the port of destination (*The Betsy*, 1 Rob. 334).

The practice, on the other hand, of the French and Continental school is to warn any neutral trader whose intention to hold communication with the blockaded port is suspected, by means of a vessel of the blockading squadron, and such warning being a condition precedent to the liability of a neutral for breach, any notice given otherwise than in this mode is ineffectual to render a neutral liable. The fact of

warning is indorsed on the papers of the neutral vessel, with the date and place thereof, and such warning having been given, the neutral vessel is then, and then only, made subject to the penalties consequent on a breach if she should thereafter attempt to enter.

It is argued by Ortolan and other modern Continental writers, contrary to the English and American view, that to sail for a blockaded port in the hope of finding the entry freed either by the fortune of war, stress of weather, or some other cause, is in itself an innocent act, and therefore should not be punished because the hope fails to be justified by the circumstances existing at the time of arrival. But it is obvious that for any country granting immunity in such case the difficulty of effectively maintaining the state of blockade is greatly enhanced, for vessels of neutrals would continually sail as close as possible to the blockaded port, waiting for the possible slackening of the belligerent's vigilance to effect an entry, safe in the knowledge that until it has been formally notified, and has attempted to enter thereafter, it is exempt from seizure. Calvo agrees with the contention of Ortolan, and considers that the French practice ought to be the accepted rule of law; whilst Hautefeuille holds that special notification is necessary, and that a diplomatic notification should be given in addition. Bluntschli takes a middle view, partially adopting the English and American practice, in admitting that special notification to the neutral trader is unnecessary; but he holds that capture can only be effected during an actual attempt at violation on the blockaded spot itself.

The next point of difference lies in the contrary opinions held as to the continuance and maintenance of the blockade. According to the English and American practice, the blockade is not raised by a mere temporary cessation of operations, provided such cessation be merely the result of unfavourable weather—*secus*, if by reason of the ships

engaged being told off for other employment. Among continental writers Ortolan considers that in order to render a blockade effectual, all means of approach must be so guarded by a permanent naval force that any vessel seeking to enter cannot accomplish its object without being perceived and turned back, and considers that if unfavourable weather has temporarily driven off the blockading force, a vessel being captured on an attempt to enter may plead ignorance of the existence of the blockade. Hautefeuille expresses himself in a similar manner. But these opinions are inconsistent with the more authoritative usage upon the subject, being much more rigid than the principles embodied in the Declaration of Paris which are accepted by the great majority of nations. And in the case of *The Franciska* above mentioned it was held by Dr. Lushington that a blockade is sufficiently effectual if the ingress or egress of a vessel would involve even a risk of capture. The Declaration of Paris (in harmony with the English doctrine) provides that "Blockades in order to be binding must be effective." This Declaration and the above opinions notwithstanding, in 1884, Admiral Courbet declared a blockade of certain parts of the Island of Formosa without having a sufficient number of ships to guard the port so proposed to be blockaded. This blockade was not recognised by Great Britain, upon the ground (*inter alia*) that it was inconsistent with the Declaration of Paris.

The remaining incident of blockade of any great importance wherein differences obtain both in theory and in practice is its breach. And the nature of the acts constituting a breach necessarily varies with the legal theory held by any particular State with respect to the acts deemed necessary for its institution and continuance. The opinions and usages held and observed by the majority of countries upon this point are again divided into two groups—those of France on the one hand being opposed to those of England

and America on the other. Summing up the French practice hereon, it may be laid down as a general rule that, as the presumption of continuance of every blockade is not admitted, the only act which will occasion forfeiture is an actual attempt on the part of the neutral to effect a breach either by force or fraud. Calvo, however, cites the case of a vessel being subjected to condemnation which was seized before it had taken any actual steps towards a breach, but while making for the blockaded port in spite of a regular notification given to her during her voyage by a belligerent vessel. But the English and American Courts, admitting as they do the presumption of continuance, it follows as a natural and logical consequence that they hold subject to confiscation the property of a trader seized at any time during the course of a voyage having clearly for its intended termination the blockaded port. And in arriving at a decision as to the trader's intention, as to which there must of necessity in many cases be considerable doubt, the conduct of the trader and all those concerned in the voyage is made the subject of enquiry. And if the result of such an enquiry be to conclusively show that the trader intended to call at the blockaded port,—only if, as the result of the enquiries he should from time to time make as to the continuance or otherwise of the blockade, he should ascertain the port to be free,—then his property will be released. But very strict proof of his innocent intention will be required from the trader, and all acts of an ambiguous character and unexplained will be taken against him.

There remains for consideration and differentiation, as to its theory and practice in its observance by States, the subject of Pacific Blockade, a measure of restraint short of war resorted to at intervals within the present century. These blockades have been conducted with greatly varying incidents, and, owing to the ever-increasing reluctance to their recognition and the isolated instances wherein they

have been resorted to, it is not easy to classify the differences of the modes wherein they have been carried out.

It seems to be the almost universal practice in the conduct of pacific blockades not to condemn vessels belonging to third powers, the only instance of the actual condemnation of such vessels occurring during the blockade of Mexico by France in 1838. It must have been owing to this that France in recent years claimed a similar right, for as incident to what that country contended to be a "pacific" blockade of Formosa in 1884, the French Government notified its intention to treat vessels belonging to third powers attempting a breach as liable to condemnation. But Lord Granville declared in a communication on the subject to M. Waddington that "the contention of the French Government that a 'pacific blockade' confers on the blockading power the right to capture and condemn the ships of third nations for a breach of such a blockade, is in conflict with well-established principles of International law," and he intimated that he should consider the hostilities which had in fact taken place, together with the formal notice of the blockade, to constitute a state of war, which would have the effect of shutting off from France the supply of coal from Hong Kong which she desired. It has been considered that the true test of the legality of a pacific blockade, *quâ* pacific, is to be found in the nature of the treatment accorded to vessels of third powers.

The general practice which would now be followed seems to be that observed by Great Britain in 1850 (and followed in 1886) during the pacific blockade of Greece, wherein Greek vessels only were seized and sequestered; even Greek vessels, however, being permitted to enter if laden with property belonging to third parties, and also to issue from port if chartered before notice of blockade was given, for the conveyance of cargoes wholly or in part belonging to foreigners: for it seems that any more stringent practice would now be held to constitute a state of war.

The next doctrine to be dealt with and the differences in its theory and practice in recent times pointed out under the category of acts, the performance of which will be a violation of the rights possessed by a belligerent, is that of Contraband. Contraband denotes those articles which a neutral cannot sell or give to a belligerent without incurring the risk of confiscation. Greatly varying opinions have been held from time to time as to what articles come within this denomination, and consequently the list of contraband articles has never remained constant. For the purpose of ascertaining what can and what cannot be contraband, it will be convenient to adopt the classification of commodities which Grotius makes. He divides them into—

- (1) *Quæ in bello tantum usum habent (ut arma).*
- (2) *Quæ in bello nullum usum habent (ut quæ voluptati inserviunt).*
- (3) *Quæ et in bello et extra bellum usum habent (ut pecuniæ, commeatus, naves).*

And here it may be stated generally that the only class of objects as to which differences of opinion have arisen upon the subject of their contraband nature or otherwise are those contained under (3). For as to those which are of use only in war, and their list can without much difficulty be compiled as occasion arises, there has never been any doubt as to their being stamped at once with the character of contraband. There is a similar absence of dispute with regard to the articles contained in (2), which can never be subjected to confiscation, save in the case (dealt with above) where they are destined for a blockaded port, and then of course the ground for such confiscation has no relation to their nature.

The answer to the question as to whether any article is contraband which may be of use either in war or peace, depends upon the circumstances of the war in the course of

which the question arises. For the number of articles treated by a belligerent as contraband usually varies with their own maritime strength, and with the degree of convenience or necessity they may find for the exclusion of particular articles from the other belligerent.

The tendency of nations in earlier times was to confine within as small a compass as might be possible the list of contraband articles, but this tendency has in modern times changed, if it has not been even reversed. Sir Leoline Jenkins, writing at the end of the 17th century, was of opinion that those articles only were contraband by the *jus gentium* which are useful only in war. But he says that each State, in order to meet the special conditions of a particular war, possessed the right of drawing up at its opening a list of articles to be contraband during its continuance. Bynkershoek lays down :—" *Omnia illa appellari contrabanda, quæ uti hostibus suggeruntur, bellis gerendis inserviunt, sive instrumenta bellica sint, sive materia per se bello apta.*"

With a few exceptions, England has not entered into special treaties or agreements defining the list of objects to be considered contraband, and consequently the records of her practice must be principally sought in the decisions of her prize Courts, which upheld, at any rate throughout the Revolutionary and Napoleonic wars, the traditional principles upon which England had always before acted, of classing as contraband not merely articles susceptible of warlike employment, but also a large number of those "*ancipitis usus.*"

Amongst Continental jurists two currents of opinion are visible. Some strive to reduce the list of contraband within the narrowest dimensions, notwithstanding the increased variety of material which is applicable more or less immediately to the purposes of warfare, the characteristic of this class being their departure from the practical view

of the subject. Amongst these may be mentioned Gessner, Hautefeuille, and Kleen. Others recognising the difficulty of making a fixed and restricted list, and the improbability that assent to any such list would be given, retain the principle of variability, whilst in most cases giving evidence of a healthy wish to confine its effects within very moderate limits. Amongst these are Ortolan, Bluntschli, and Heffter.

The right of a belligerent to class a particular object as contraband is based upon the essentiality of that article to the other belligerent for his warlike operations. This is the common-sense view of the whole doctrine, and it is hereunder that articles which may be of use either in peace or war are invested with the character and liability of contraband. And in determining under what circumstances articles ambiguous in their nature may be justifiably seized, the main difficulty is to ascertain a fixed and constant test of this essentiality, or in other words, to be able to conclusively prove in a given case that particular articles would be essential to the conduct of the war. In an enquiry into the differences in the law and practice of nations in recent times as to contraband, it will be expedient to classify for consideration articles other than munitions of war, according to the greater or less frequency of their relation to warlike operations, and therefore according to the greater or less urgency of the circumstances the happening of which may give a belligerent the right to prevent their access to his enemy.

Saltpetre and Sulphur.—These must be placed first on the list, as coming nearest of all to articles necessarily warlike in their nature. As to these it may be premised that forming as they do the chief constituents of gunpowder (the only other constituent being the common and easily obtainable article charcoal) they come perilously near the division line between those articles of use only in war and those useful either in war or peace, and consequently are universally

held to be contraband, although, of course, their intended use might possibly be for a purpose totally unconnected with war.

Horses.—It may be laid down that it has always been the practice of England and France to regard them as contraband, and, with the exception of a few treaties contracted by Russia at the end of the 18th century, a similar practice may be stated to obtain amongst other nations at the present time. In the treaties, however, between the United States and other American countries, the character of contraband is limited in its application to cavalry mounts, and this limitation Bluntschli treats as following the principles of International law and usage, though it is difficult to see any sound principle whereon he could base the distinction, horses being as equally important in war for carriage of stores as for the mounting of soldiers.

Materials of Naval Construction.—These have not been so universally invested with a contraband character. The English and American practice is to divide such objects into two classes, according as they are manufactured or not, treating them alike in their seizure, but differently in their disposition when seized. Manufactured articles are generally subjected to the full penalties, but in the case of raw material, more especially where it forms the staple produce of the country exporting it, the penalty of confiscation is usually relaxed, that of pre-emption being usually imposed in its stead. The practice of France is, however, not to treat these articles as contraband, and she is supported in this by a number of other nations. This practice does not appear to be a convenient one, for it is apparent that to deprive a country poor in forests or in iron of these necessary articles of offensive warfare, is to obtain over them an overwhelming advantage, and this, of course, is the purpose to which the whole doctrine of contraband is directed.

Coal.—Having regard to the fact that it has only com-

paratively recently become of importance in war, there has scarcely been time for any settled principle to be laid down as to its character. In 1859 and again in 1870, France declared it not to be contraband, and on the authority of Calvo the greater number of secondary States are prepared to follow this view. The practice of England, as evidenced by her conduct in the war of 1870, is to have regard to the intended destination, in order to determine whether it is to be subjected to seizure. For if it is to be used for belligerent purposes, as might be evidenced, for example, by an intended destination to a naval station, it is acting in accordance with sound principle to subject it to the penalties of contraband, taking into account the importance of coal in modern maritime warfare.

Provisions.—The doctrine of the English Courts at the commencement of the present century was, that generally they are not contraband, but might become so in circumstances arising out of the particular situation of the war or the conditions of the parties engaged in it, and it would seem that this doctrine is recognised by this country at the present time. Ortolan, Bluntschli, and Calvo are of opinion that provisions can only be contraband when sent to ports actually blockaded or besieged, but this seems to be a contradiction in terms, for their destination to a blockaded port being the *only* reason for their seizure, it follows that they are not liable to seizure by reason of their nature, and cannot consequently be styled contraband. In 1885, France, contrary to its general policy of confining the list of articles considered by her to be contraband within the narrowest possible limits, declared in relation to her war with China that she would treat shipments of rice destined for any port north of Canton to be contraband. This declaration was opposed by the contention of England that, although under particular circumstances which in the present case had not arisen, provisions may acquire a contraband character, they

cannot in general be so treated. France in her reply sought to violate a well-established principle of International law, viz.: that a belligerent may not put restraint upon the non-combatant inhabitants of its enemy's State, for she alleged her action to be justifiable on the ground that rice was of importance in the feeding of the Chinese population. Lord Granville notified that Great Britain would not consider itself bound by the decision of any prize court which should frame its decision in accordance with the contention of France; but as the fear of seizure prevented the shipment of any cargoes of rice the occasion did not arise for any such decision.

Money: Unwrought Metals: Clothing and its Materials.—These are subject to be treated as contraband under circumstances similar to those under which provisions will be so treated. In the opinion of Manning, however, metals and money are not contraband. This opinion is not in accordance with the practice of the United States, who, during the Civil War, regarded cotton as contraband, owing to its having to some extent taken the place of money, thus in effect declaring money to be contraband, although it might be contended that the reason for the prohibition was based upon the principle that a loan of money to a belligerent is a violation of neutrality.

Certain differences of opinion exist as to the effect of contraband on the vessel carrying it. The penalty attaching to the goods is not in general extended to the ship, and some writers even consider that the neutral vessel has a right to continue on her voyage on her abandoning the contraband she is carrying to the belligerent, unless their quantity is so great that the captor cannot receive them. And this practice was followed by the Confederate States during the American Civil War, though in the opinion of Wheaton it could only be applied to cases in which there is a capacity in the neutral vessel to insure the captor against

a claim to the goods. But, under the more common practice, the vessel with its contraband cargo is taken into a port of the captor, where the contraband articles are dealt with either by confiscation or pre-emption, the vessel itself in ordinary cases being subjected to no further penalty than loss of time, freight, and expenses. If, however, the owner of the ship is a party or privy to the carriage of the contraband goods, the ship itself is dealt with in a similar manner to the cargo. And this exemption from seizure of the vessel itself, unless complicity on the part of the owner be proved, is a wise and necessary provision, for were it otherwise the risk a shipowner would run on letting out his ships under charter-parties, at a time when hostile operations were being carried out, would be so great and impossible to guard against, that the whole shipping and mercantile insurance business would be very seriously affected, if not in some cases brought to an entire standstill.

CHAS. L. NORDON.

VI.—THE RIGHT OF THE SUBJECT TO PERSONAL LIBERTY IN ENGLISH LAW.¹

A STURDY assertion of the right of personal liberty has from the earliest times characterised the British race.

The persistent growth and gradual triumph of this right have been proudly recorded by every native historian, and have compelled the admiration of every foreign student of our history and constitution.

During the evolution of the British people from a number of semi-barbarous tribes into the foremost imperial race of

¹ A summary of the Historical Introduction to the *Lee Prize Essay, 1900*, on "The Right of the Subject, under the Laws of England, to Personal Liberty."

the world, no principle of the British Constitution has been more strenuously asserted or more jealously guarded than the principle of personal freedom. During the last two and a-half centuries it has been so continuously extended, that now, in the complex ramifications of our policy, it can be said that the liberty of the individual is restricted simply by the correlative rights of the community of which he is a member.

Personal liberty is what a jurisconsult would call a "natural right." It is retained by every individual who does not waive it by contract or forfeit it by crime.

But the individual man has found it necessary in every system of society to surrender some portion of his primeval liberty—his Robinson Crusoe-like freedom—in order to share in the advantages of that social life to which his instincts lead him. Therefore some *compromise* between the claims of the individual and the claims of the community is absolutely necessary if social order is to be preserved. In return for the benefits of social life, the individual must limit his personal liberty at that point where it would trespass on the welfare of the community to which he belongs. Whatever he allows to be taken away from him as an individual, that, exactly, he correlatively receives back from the other members of his community. He who accepts the security of civil society impliedly binds himself not to transgress those limitations upon personal liberty by which the law protects others from him, and him from others.

In most polities, whether despotic or democratic, the compromise has been greatly in favour of the Executive, as the concentrated representative of the community. Rebellion and revolution have often effected a change in the *personnel* of the Executive, but it is seldom that they have effected a radical alleviation of the lot of the rebellious individual, or shifted permanently the balance of the compromise more towards his side of the scale.

In sifting out, and setting forth in something approaching chronological order, what is most material to our subject, peculiar importance must be attached to what Professor Dicey terms "the provision of adequate legal means for the enforcement of the right of personal liberty." Leaving the "free customs of our forefathers" to the champions of the heredity theory, we find that, paradoxical as it may appear, the first definite step to be taken, by a community desirous of establishing a legal and enforceable right to personal liberty, is to surrender it, more or less conditionally, into the hands of a king or other paramount sovereign power. In return the king is expressly or impliedly bound to preserve to each of his subjects his rights according to the laws or customs of the community. Unfortunately, the history of every country shows the working of this simple compact to have been complicated by successful revolution or unsuccessful rebellion, or voided altogether by foreign conquest, or varied by act of party, until the constitution may have assumed on the one hand the nature of a permanent absolutism, as has occurred in Eastern countries, or of spasmodic anarchy on the other hand, such as is seen in the South American states, where revolution seems endemic.

It would appear that the passing, in Anglo-Saxon times, of what Professor Freeman terms "the folks' Justice" into "the Justice of the King," marks the first important step towards the establishment in our body politic of practical administrative methods for vindicating the right to personal liberty. Before this time the more powerful thegns had been able to influence in their own favour the judgments of the local "Moots," or if they had neglected to do this, they were, too frequently, mighty enough to disregard its "dooms" with impunity.

Some historians¹ have ascribed the origin of "trial by Jury" to the jurisprudence of the Anglo-Saxon period. But

¹ Nicholson & Forsyth.

it is probable that this institution has been confused with the ancient Saxon usage of "compurgation."¹ The coincidences of numbers which are noticeable in the two systems seem to have given rise to the traditions which for long regarded this "palladium of our liberties" as of Anglo-Saxon derivation.

But such is not the case with regard to the origin of the law of bail and surety which is clearly traceable, through the Norman "frankpledge" back to the Anglo-Saxon system of "tenman's tale." The right to be admitted to bail has, during an extended period, done much to alleviate the position of accused persons. Its establishment appears to be the last material advance, relevant to our theme, made in the practical jurisprudence of the Saxons.

The Norman Conquest to Magna Charta.—It is difficult to decide whether in its ultimate result the Norman Conquest forwarded, or retarded, the progress of the cause of personal liberty. Probably it forwarded it indirectly. What Fox, in his *History of James II*, says of the reign of Henry VII is peculiarly applicable here: "Tyranny was "its immediate, and liberty its remote consequence, but he "must have great confidence in his own sagacity who can "satisfy himself that, unaided by subsequent events, he "could from a consideration of the causes have foreseen "the succession of events so different."

The Conqueror uprooted the mild sovereignty of the Saxon chieftains, and planted in its stead a foreign despotism. But he established a powerful central organisation, allowed "no rapine but his own," insisted on the maintenance of public order, and checked the calamitous invasion of the Danes and Norsemen.

He dotted the landscape of England with frowning castles, introduced a foreign aristocracy, and devised for it a new feudalism. But the new aristocracy "high mettled the

¹ Hallam: *Middle Ages*.

blood of our veins," and was assimilated in good time by the substance of the nation: moreover the power of the castles, and the discipline of feudalism, were found arrayed on the side of the people against his kingly successors at Runnymede and Lewes.

He temporarily depressed the liberties of the English people. But, ultimately, by exhibiting to them the value of a strong and stable central administration, he unwittingly despatched the English in the right direction in their quest for well-ordered liberty. Sismondi says of the Normans that they had "the habits of military subordination, and the aptness for a state politic which could reconcile the security of all with the independence of each."

During this period the appointment of itinerant judges by Henry II develops and improves our methods of legal administration. Thus the Common law of England came to displace in a great degree the local customary laws hitherto observed. And the jury system now gradually evolves out of the system of "sworn inquest,"¹ introduced by the Conqueror when that first Royal Commission in our annals compiled our first blue-book, to wit, *Domesday Book*.

Magna Charta to the accession of the Tudors.—The fifteenth of June, 1215, Magna Charta day, is a brave day in our battle-strewn struggle for liberty. The essential clauses of this most famous of all Charters were, as Hallam well observed, "those which protected the personal liberty and property of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation."

"Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut ullagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ. Nulli vendemus, nulli negabimus, aut differemus rectum aut iusticiam."²

¹ Digby: *History of Real Property*—and Stubbs: *Select Charters*.

² Clauses 39 & 40 Magna Charta.

Commenting further on these, Hallam says:—"It is obvious " that these words interpreted by any honest Court of law " convey an ample security for the two main rights of civil " society." But in those days and for many centuries afterwards "honest Courts of law" were the exception rather than the rule. Therefore, only from the standpoint of theoretical law is it justifiable to assert that these clauses immediately conveyed "an ample security" for the personal liberty of mediæval Englishmen.

As a matter of history it is only too notorious that the "royal practice of arbitrary imprisonment" was practically unchecked by the Great Charter. The wide promulgation of the principles of Magna Charta,—creative of public opinion as they undoubtedly were,—probably caused it to act as a deterrent, at least, in the ordinary run of cases affecting the individual freedom of the subject. In those cases where the parties to a dispute were subjects of a somewhat similar social position, and in those between the lower class of executive officers and private persons, the principles of personal freedom contained in these clauses were probably of frequent assistance to wronged parties. But the time was not yet when the doctrine of "equality before the law" was fearlessly and strictly applied in those cases in which the Crown and Executive were interested. Where the subject was imprisoned at the instance of the king, or any high executive official, various ways of defeating this theoretical right of the subject were readily discovered owing to the lack of indefeasible methods of legal procedure. Centuries were destined to pass before these defects were completely remedied. It is not until the seventeenth century that we find the practical means, and the "remedial provisions" for enforcing this principle of personal liberty, rapidly over-taking and non-plussing the frequent invasions hitherto made upon the right by the Crown and its creatures.

The right of personal liberty is essentially a right which requires for its preservation, not only the theoretical safeguards upon which it still totters in many continental systems of jurisprudence, but also such practical remedial procedure as is provided by our Habeas Corpus Acts, these administered by an independent judiciary, supplemented by something akin to our jury system. Lord Russell, in his chapter on "Civil Liberty," remarks that the *renewals* of Magna Charta prove the practical inefficacy of that great compact, as much as the *suspensions* of the Habeas Corpus Act prove its practical efficacy."¹

The chief contribution of Magna Charta to the cause of personal liberty was that it provided for that and later ages a theoretical ideal. In its renewals the positive right of the subject to personal freedom was clearly recognised by the very kings who most offended against its spirit. Ever since Magna Charta the liberty of the subject has been in theory a cardinal principle of our constitution. Regard for it has profoundly affected our legislation on many other matters. Frequent violations of the principle displayed the defects of Magna Charta to the jealous eyes of the nation. Thus around its defeasible theories—which were never of much immediate use to the person unlawfully imprisoned, our forefathers, step by step, constructed practical remedies for its violation, until at the present day the ideal has been almost realised. The adjective law regarding liberty has now approximated to the substantive law declared in Magna Charta.

Between Magna Charta and the accession of the Tudors it is necessary to notice, briefly, certain occurrences relevant to the growth of personal liberty. First in point of ultimate importance is the institution of regular and representative parliaments. And now the jury system—a palladium of liberty—developed and much extended its beneficent effect

¹ *English Government and Constitution*, p. 72.

on the administration of justice. 'The right of every accused person to a fair trial was recognised by the statute 5 Edw. III, c. 9, which enacted that "no man may be forejudged of life or limb." In 1352, by the famous Statute of Treasons, the vague and uncertain law of treason, which had been an engine of much oppression in the hands of Norman lawyers, was codified and restricted. And by this time slavery had become obsolete in England, owing chiefly to the humane doctrines and efforts of the Christian Church. Villeinage, though not legally abolished until the belated case of *Pigg v. Caley* in 1617, was virtually extinguished. And finally, it is to be noted that by this time the Norman and English elements, drawn together by a series of common interests and common adversities, had become welded into one nation. The English tongue had again become the language of the governing classes as well as that of the governed, and "every Englishman had now learned to consider himself the citizen of a free State, and to claim the Common law as his birthright, even though the violence of power should interrupt its enjoyment."¹

The Tudor Period.—In his *English Government and Constitution*, Lord Russell remarks that "long civil war induces a people to surrender liberty for peace, as long peace induces them to encounter even civil war for liberty." Henry VII came to the throne of England after an extended period of useless civil warfare. Remembering the horrible distress caused by the Wars of the Roses, the nation submitted with comparative meekness to the century of "enlightened despotism" which now followed under the Welsh dynasty. Fortunately for the nation and the cause of liberty thereafter, the House of Tudor used Parliament as its chief instrument of government. Owing to this fact the troublesome reins of government fell into the Parliaments' hands. The Tudor ministers obeyed their strong-willed

¹ Hallam: *Middle Ages*, p. 583.

masters, but, the dynasty^a which followed had neither the strong wills, nor consequently the subservient ministers of their predecessors.

Many of the institutions introduced into our Constitution by the Tudors were insidious enemies of liberty. But in their ultimate result these spurred the nation on to those revolutions which not only swept them away, but also rooted out from our Constitution many other pestilent weeds which might by themselves have been suffered to remain until a much later period.

The most tyrannical phase of despotic government introduced by the Tudors was the institution of new and extraordinary Courts. The most notorious of these were the Court of Star Chamber and the Court of High Commission. The jurisdiction and administration of these tribunals were entirely subversive of the liberties of the people. Aided by them, the Crown began to develop methods of oppression of terrible potency. Now it was that the "Prerogative" began to assume new powers regardless of the laws of the land.

The Court of Star Chamber, legally derived from the Magnum Concilium Regnum, was ostensibly revived to carry out the commendable laws of Henry VII for the repression of "Maintenance." But this tribunal was soon put to baser uses. Its judges were partizans of the Crown. The accused persons were frequently political opponents of the government of the day. Its procedure was of an inquisitorial nature. It dispensed with juries. It employed torture, and pronounced sentences based upon confessions obtained by its employment, without further formal trial. It punished by imprisonment, fine, pillory, flagellation, and mutilation. But the most dangerous of all its assumed powers was the exercise of an arbitrary and illegal supervision over the ordinary Courts of justice. *Prynne's Case* may be referred to as a bad example of the uses it was put to by

the royal creatures. The Court of High Commission had a jurisdiction over *spiritual* causes similar to that of the Court of Star Chamber over *secular* offences. As an illustration of its methods, the case of Dr. John Bastwick may be noticed. In a tract called "The New Litany," he contended that the bishops of that day showed a tendency towards Popery. For this he was sentenced to have both his ears cut off, to pay a fine of £5,000, to stand in the pillory, and to imprisonment for life.¹

Summing up the Tudor reigns, there is but little of a legislative nature to record that is directly beneficial to the cause of personal liberty. There were certainly some modifications of the strained laws of treason in the reigns of Henry VII and Edward VI. And the repression of "Maintenance" placed weak subjects more on a footing of legal equality with the powerful. Before this, perversions of justice in local courts were of frequent occurrence, owing to the presence of large bodies of armed retainers, who at the bidding of their chiefs were only too ready to intimidate plaintiffs, juries, and sheriffs in provincial Courts. It is also seen that the poor laws were organised, the vagrancy laws improved, and private jurisdictions almost abolished.

On the whole the Tudor sovereigns seem to have been popular tyrants, and there is some truth in the remark of Hume, "that the English of that age, like Eastern slaves, were inclined to admire those acts of violence and tyranny which were exercised over themselves and at their own expense."

The Stuart Period.—The most tyrannical kings of this country have been the unconscious parents of the best liberties in our constitution. The oppressions of John gave birth to Magna Charta. The autocratic methods of James I and Charles I brought into being the Petition of Right, and the beneficent legislation of the Long Parliament. The

¹ See Stubbs.

Habeas Corpus Act, the Bill of Rights, and the Acts of Settlement, are the children of the foolish misgovernment of the later Stuarts. Much in the same manner has the Englishman's right to personal liberty developed into an *enforceable* one in our laws. A series of despotic violations of the Common-law right produced a series of statutes which crystallized the right into more definite form. And, what was equally important, the methods of violation adopted showed the absolute necessity for the provision of an independent judiciary by which it was to be vindicated, and indefeasible forms of procedure by which it was to be safeguarded.

Patient as the nation had been under the more or less expedient despotism of the Tudors, it soon began to oppose the autocracy of the Stuarts, which quickly discovered itself to be of a weaker fibre and of a less excusable nature.

The oppressions of the Stuarts were so often found to be technically legal, that they swept away the ancient faith of Englishmen in the efficiency of their boasted Common law to prevent invasions of their liberties by the Crown. Henceforward may be found a series of statutes and reforms in legal administration which have completely altered the position of the subject with regard to individual freedom.

But before proceeding to record how our forefathers thus wrested the recognition of their liberties from the Stuarts, it will be convenient to tabulate the *essential elements* necessary to ensure the certain enjoyment by the subject of his right to personal liberty. These essential elements are:—

(1) The right must be posited in the express laws of a high and public-spirited nation.

(2) The provision of indefeasible methods of procedure to enforce it. These should ensure, *inter alia*, a speedy trial.

(3) The establishment of a judiciary which is absolutely independent, "*dum se bene gesserit*." This would tend to ensure "equality before the law."

(4) The judiciary, being fallible in the nature of things human, should be supplemented by some such system as our "trial by jury."

(5) The provision of a system which would ameliorate the lot of accused persons during the interval between arrest and trial, *e. g.*, something akin to our "bail."

(6) The provision of legal remedies for its violation, such as our actions for "false imprisonment" and "malicious prosecution."

(7) Representative government to preserve it, and to provide further legislation regarding it as occasion requires.

In order to appreciate better the progress which the cause of personal liberty has made since the Stuart period let it be recollected how matters then stood. The position may be regarded from the seven essential points above tabulated. A comparison will then be made of the right in 1628 and 1716.

(1) Referring to the first essential we find that the express law of the land was disregarded by the early Stuarts whenever it was found incompatible with the "Prerogative" as defined by them with the assistance of their servile Crown lawyers. By virtue of "Divine Right" and the "Prerogative" the Stuart kings "dispensed" or "suspended" the ordinary laws and customs of the land at their own pleasure.

(2) The methods of procedure, providing the accused with means to obtain a speedy trial, were defeasible. The writ of *Habeas Corpus* was easily avoided, and prisoners might languish in gaol, without trial, until their deaths, no reason being given for their detention, except that they were there *per speciale mandatum regis*, as in *Darnel's Case*.¹

(3) With regard to the third essential: the judges being removable at the pleasure of the Crown were not inde-

¹ 3 *State Trials*, p. 1.

pendent. When cases involving royal interests arose, the judge had to decide whether he preferred to interpret falsely or place himself in danger of being removed from his position. This latter fate overtook Coke, Crewe, and others.

(4) Juries were also in a dependent position. They were influenced by the judges much in the same way as the judges were by the Crown. If they did not bring in a verdict in accordance with the direction of the judge they could be fined or imprisoned, as occurred in *Bushell's Case* in 1670.

(5) The right of accused persons to be admitted to bail could be made null and void when the "powers that were" considered it expedient. This was easily effected by demanding such an excessive bail that it was impossible for the accused to give it. In Glanvil's *De Corona* we find that the amount of bail was left entirely to the discretion of the judge.

(6) The doctrine of the "personal responsibility of ministers and executive officers" for deeds in the name of the Crown was not yet established, hence were wanting the remedies for false imprisonment which were thereafter obtainable by Wilkes and others against high officers of State who arbitrarily invaded the personal liberty of subjects.

(7) As to the seventh essential, viz., representative government, it is a notorious fact that the three first Stuart kings made determined efforts to govern without the aid of Parliament. When driven to call a Parliament together by necessity, they often summarily dissolved it for what they called "disobedience." This occurred in 1614, 1626, 1629, 1640, and 1681.

Many other miscellaneous abuses closely affecting the liberty of the subject were still in our midst in 1627. Martial law was administered in times of peace. Soldiers were

arbitrarily billeted on poor families. Negro slavery was encouraged in our colonies, and "white man slavery" had not yet been abolished from the "salteries" of Scotland itself. The right of asylum on our shores was still denied to Jews. Nor was it freely extended to all other classes of religious and political refugees from the continent. While immigration was thus prevented, cases show that emigration was also restricted. It is said that Cromwell, Pym, Hampden, and Hazelrigg were, by the order of Charles, stopped from proceeding after having actually embarked for New England. If this was within the personal knowledge of Charles, how bitterly he must have repented this particular action after Marston Moor!

It is possible to draw a striking comparison with regard to the degree of personal liberty enjoyed at the date of the accession of the Stuarts and that enjoyed at the date of the accession of the Guelfs, *i. e.*, 1604 and 1715. It is to this intervening period that we can trace the establishment of most of the fundamental safeguards of our personal liberty, Chief among these were:—The Petition of Right in 1628; the final abolition and declared illegality of such tribunals as the Courts of Star Chamber and High Commission in 1641 and 1689; the decision in *Bushell's Case* in 1670 which established the immunity of juries; the Bill of Rights 1689; the desuetude of the censorship over the Press noticeable in 1695; the removal of the cause of judicial servility by the Act of Settlement 1704, which made the judges practically independent of the Crown favour; the Triennial Act 1641 and Septennial Act 1716; the growing sovereignty of Parliament, and last—but most directly effective of all—the Habeas Corpus Act 1679.

Led by a few intrepid spirits the Parliament of 1628 began immediately to insist upon the redress of current grievances. The Petition of Right was presented to Charles with the intimation that until it was signed no supplies

would be granted him. Embodied in the Petition were demands that certain ancient rights, which Englishmen regarded as their birth-right, should be formally acknowledged by the king. Relevant to our subject it contained the clauses: "that no man should be imprisoned except on a definite and specific charge." The necessity for asserting this claim had been shown a few months previously in the famous *Darnel Case*, sometimes called the *Five Knights' Case*.

Secondly, it affirmed "that no martial law be proclaimed in times of peace." Charles after some sincere demur gave it an insincere assent. As someone has put it, "he assented with tacit reservations." It may be said of Charles as Thackeray said of Bolingbroke: "He signed his own name to every accusation of insincerity his enemies made against him."

(To be continued.)

VII.—CURRENT NOTES ON INTERNATIONAL LAW.

The Alaska Boundary Award.

THE award of the Alaska Boundary Commissioners (though unfortunately that of a bare majority only) is, as seemed likely on the reports of the arguments, substantially in favour of the United States on the question of what may be called the land boundary, and in favour of Canada on that of the sea boundary, or the determination of the Portland Channel. Taking the latter first, the majority of the Tribunal have adopted a line which is not the one contended for by either party, and divides the islands, which either contention would have secured wholly for their side, equally between them, awarding Wales and

Pearce Islands to Canada, Sitzklan and Kannaghunut to the United States, though afterwards it follows the Portland Channel and the Observatory Inlet, and thus puts the boundary considerably to the north of the line proposed by the United States. On the second point the two decisive questions for the Tribunal's consideration were what the word "coast" meant, and whether the mountain crest line, or the ten marine league distance from the ocean, were to be respectively the principal and subordinate lines to be followed or *vice versâ*. On the wording of the Treaty the actual coast touched by ocean water would *primâ facie* be that meant, especially in view of their context "parallel to the sinuosities of the coast"; the express concession by Russia of the right for ten years after the Treaty to make use of the inland seas, gulfs and waters, is a strong presumption against her having intended to exclude the inlets from the coast; and in an International law document the natural meaning of the word would be the actual coast, and not such vague terms as the "general trend" or "waving line" of the coast. The Tribunal, in finding that they could identify the mountain line designated by the Treaty only with a range standing back from the coast more than the measured limit of distance, and that only over a part of the territory to be delimited, adopted the American contention that the measured limit was the primary one to be corrected by the mountain line where practicable; and this decision gives effect to the undoubted meaning of the negotiators of the Treaty that Russia should possess a substantial *lisière* of territory as a security for her complete possession of the coast. Another element which by the terms of the reference to the Commission was to receive consideration, was the fact of settlements and the exercise of authority in the disputed territory; and although, as our Attorney-General urged, there is no statute of limitations in International law, acts of user create a strong presumption if not a prescription.

It is to be regretted that the Canadian Commissioners refused to be parties to the award, apparently because they did not consider the opinion of the majority on the points of the position of the mountain line and the title to the islands off the Portland Channel to be judicial but the result of a compromise. It is an inherent defect in adjudications by mixed Commissions on questions of International law that the questions may be approached by the members of the Tribunal, to some extent at least, from a national and diplomatic point of view, which reference of the difficulty to a third party would obviate; and the recent example of Argentina and Chili shows that it is possible to submit to the arbitration of a third party even a question involving title to territory with the happiest result.

The Venezuelan Arbitration.

The award in the Venezuelan arbitration of the Hague Tribunal is not yet announced, but it is gratifying to note in the proceedings distinct signs of a desire that the procedure of the permanent Court should approximate more nearly to the ordinary course of litigation between individuals than has been the case in special references to arbitration; and that the Court has the right to regulate its procedure according to what it thinks just towards all the parties represented before it, irrespective of the terms of reference to it arranged between the parties originally concerned in the dispute. As the first case before the Hague Tribunal in which more than two nations have been parties it should be a valuable precedent. Thus, as regards the presentation of claims, it was urged on behalf of the interveners (Belgium, France, Spain, Netherlands, and Sweden and Norway), that the blockading Powers were in the position of plaintiffs, as their demand of priority amounted to claiming a privilege contrary to the Common law, and they should therefore prove their case before the interveners should be called upon

to reply to it. Counsel for the blockading Powers, on the other hand, pleaded that according to the practice of previous arbitrations both parties should present their claims simultaneously and their counter-cases at a later time, the German representative also taking the ground that the blockading Powers were in the position of secured creditors, and therefore defendants. The Court apparently decided in favour of the latter contention, but allowed only a short time (fifteen days) for delivery of the memoranda and documents, and another fifteen days for the replies. With regard to the official language for the proceedings, which by the protocols between Venezuela and the blockaders was to be English, except the arguments of counsel, the Court decided that French and English should be equally used and have the same value: and that written or printed memoranda should be presented in English but might be accompanied by a translation in the language of the country presenting them.

The case for Venezuela was first heard, and was rested on the grounds (1) that the Hague Convention was intended to put strong and weak nations on an equality: (2) that a strong nation which had differences with a weaker one should not be allowed to exercise force in order to compel payment of debts: (3) that the complaints of the blockaders were not valid grounds for war, and their action was taken on behalf of their subjects financially interested in Venezuelan commercial undertakings, for which there was no historical precedent, and in disregard of the valid counter-complaints of Venezuela: (4) that to give the blockaders preference to other creditor nations would be equal to rewarding a strong Power for forcing payment from a weak one by aggressive action. The arguments on behalf of Great Britain were based on the fact that she and her co-operators had obtained by their own efforts and

at their own expense and risk a security for payment from their debtor: that the means employed were proper and necessary, and were admitted to be such by the debtor, but if they were not, the tribunal could not inquire into their propriety: and that it would be unfair that other parties who had stood by should be placed on an equality with them for payment, as they had no *locus standi* as regards arrangements to which they were not parties. For Italy it was urged that by the Roman law priority in payment was conferred on parties who were diligent in prosecuting claims and incurred risk and expense in so doing.

• • **The New State of Panama.**

The new State set up at Panama independently of Columbia in November last has by now, it is understood, been recognised by all the principal Powers following the lead of the United States; and it is perhaps an unexampled event in international politics that where part of a sovereign State throws off the authority of a central government the new government *de facto* should thus become almost simultaneously *de jure*. The United States have justified the promptness of their action on the ground that under their treaty of 1846 with New Granada, which comprised the republics afterwards merged in the confederation of Columbia, that State guaranteed free transit across the Isthmus to the government or citizens of the United States by any means of communication existing or to come into existence, in return for a guarantee by the latter of the neutrality of the Isthmus, and of the rights, sovereignty, and property of New Granada there. For some time past, indeed, American forces have been employed in policing the railway across the Isthmus for the benefit of general commerce. In a special message to Congress containing the official correspondence on this subject, the United States President has declared that his Government in no way

incited, prepared, or countenanced the revolution, which was caused by the Columbian Legislature rejecting the treaty agreed upon by her Foreign Minister and Mr. Hay for the construction of the Isthmian Canal through Columbian territory: and although as a general rule a new State should not be recognised till it has shown that it is able to maintain its independence, yet that rule is subject to exceptions, and departure from it was justified and required in the present case by the treaty rights of the United States, the material interests of both countries, and the collective interests of the civilised world. The United States have followed up their recognition of Panama by a treaty with her (November 18th, 1903), under which Panama cedes to them for ever the land required for the construction of the canal, with sovereignty over a *lisière* of ten miles on either side of it, as well as the right to fortify and police the *termini*, though the cities of Colon and Panama remain municipally autonomous as long as they keep order to the satisfaction of the United States, in return for a sum of ten million dollars and a guarantee of its independence, the canal to be neutral and open to ships of all nations on equal terms. Columbia has announced that she will take forcible measures to recover her sovereignty over Panama; but, in view of the United States having guaranteed its independence, and having intimated that in their judgment the interests of commerce and civilisation require the closing of the state of civil strife in Panama, this is hardly likely to be effectual.

Regarded merely from the standpoint of international practice in recognition of a new State severing itself from an old one, the action of the United States is not in accordance with the precedents in its own diplomatic history. In the case of the revolt of the Spanish-American Republics from Spain in 1810, they did not recognise them till 1822, and Great Britain did not until 1825: in the case of Texas

seceding from Mexico in 1835, the then United States President in 1836 advised delaying recognition on the ground that "premature recognition under such circumstances, if not looked upon as a justifiable cause of war, is always liable to be regarded as proof of an unfriendly spirit to one of the parties, and in the case of the Spanish Colonies they had remained neutral until the ability of the new States to protect themselves was fully established and all danger of their being subjugated had passed away"; and the United States did not recognise Texas till 1837. In 1816 Mr. Adams, in a statement of the considerations affecting the right of according recognition addressed to President Monroe, emphasised the necessity of two conditions being fulfilled in order to authorise a neutral to accord recognition: (1) the fact of the new State's independence being established, (2) the right of that State to claim recognition from the neutral (Hall, 90: Wharton, 370). Neither of these being satisfied in the present case, the act of recognition is not compatible with friendly neutrality to Columbia.

But the truer point of view is to regard the action of the United States as an intervention; and intervention, though always an act of policy or force, is held to be sanctioned when necessary for enforcing treaty rights, or for self-protection, or even, perhaps, humane considerations. Hall characterises as interventions such recognitions as those of Greece in 1832 and Roumania and Servia in 1878, by the collective body of Powers (92). It is difficult to see how any of these grounds justify that action in the present case. The treaty of 1846 was made with the same confederation of States as now constitutes Columbia, and is a formal guarantee of their sovereignty, and is not applicable to one of their States only against the will of the rest, unless that State has strength enough to emancipate itself from that union and can claim to be the successor of the original

State so far as its territory is concerned. The United States has always hitherto been careful to recognise the sovereign right of Columbia when it has sent its forces previously into the Isthmus to keep the transit open: and the letter and spirit of the treaty can hardly admit of its guarantee being turned against Columbia itself on the outbreak of revolt by one of its members. The United States can however say that, if they have been prompt to take advantage of a new political situation which will enable the projected Isthmian Canal to be made, the action of the other Powers as well as Great Britain in acquiescing in it shows that they are satisfied that the intervention has been made in the general interest of the world's commerce. Although the Clayton-Bulwer Treaty is no longer in force to prevent either the United States or Great Britain from extending their political influence over Central American territories, and the Hay-Pauncefote Treaty replacing it provides for the very contingency now realised of the rights of territorial sovereignty over the projected canal changing hands, the Monroe Doctrine seems to provide sufficiently for the maintenance of the *status quo* in the Americas (see this Magazine, 1902, Vol. XXVII, 218). In judging of this act of policy it must also be remembered that (see these Notes, Vol. XXVIII, 87) the perpetual state of political unrest prevailing in the smaller American Republics has been treated by foreign States as justifying them in insisting that this shall not cause needless disturbance of the world's commerce, and interfering for that purpose by international police measures which perhaps are not strictly justifiable. An almost comical instance of this is afforded by the announcement (January 8th) that in San Domingo, where a revolution is in progress and the Government has declared certain ports to be in a state of blockade, the Commanders of the British and American Naval forces on the spot have notified the authorities that only such hostilities can be allowed as are in accordance with regu-

lations which those Commanders will issue, and which do not interfere with British and American commerce. A distinction may, however, be drawn between action which is restrictive of domestic disturbance in a State, and action which makes possible, if it does not cause, a diminution of a State's territorial integrity for the advantage of the intervener, which comes very near to annexation in the present case. It certainly seems more satisfactory to rest the international validity of the course taken in the present case on intervention, instead of that of a recognition justified by exceptional circumstances, as in International law the admission that exceptions may be created to rules by circumstances may be utilized for nullifying the effect of those rules altogether.

Korea.

The dangerously strained relations between Russia and Japan on account of their future neutral relations in Korea make a situation which may seriously test the effect and value of our treaty of defensive alliance with Japan, made nearly two years ago (Vol. XXVII, 332). The events which have occurred since its signature have not shown that it has produced any effect in the way of preserving the integrity of China so far as regards Manchuria, in which the "special interest" of Great Britain was expressly declared to lie, the evacuation of Manchuria by Russia, which Russia had agreed with China to carry out last year, not yet having taken place, although China has just opened two towns in Manchuria to foreign trade by treaty with the United States and Japan. The future position of Korea, in which the treaty declared that "Japan is interested in a special degree politically as well as commercially and industrially in addition to her interests in China," concerns Japan too closely for her to allow the same thing to take place as in Manchuria. Whether Great Britain, in the event of war between Russia

and Japan, can confine her action to the limits required by the treaty and no more, is a question of international policy not law, but it is not to be supposed that if China or Korea sided with Russia that would bring into play our undertaking to help Japan. It is, at the same time, difficult to see how a party to a treaty specifying certain special interests as common to its ally and itself can allow the defeat of that ally if involved in war on account of such special interests and their consequent loss, without making the treaty a nullity.

The relations of Korea and the Powers are based on recent commercial treaties: Japan (1876 and 1883); United States (1882), the first occasion on which Korea entered into treaty relations with any foreign Power, prefacing it with a declaration of her power and intention to do so in future; Great Britain (1883), Germany (1883), Italy (1884), France (1886), and Austria Hungary (1892). All of these follow the same lines, granting consular jurisdiction over foreign residents and most favoured nation treatment. Russia and Japan have also defined their relative functions in Korea by agreements in 1896 and 1898, the effect of which is that they pledge themselves not to keep any troops in Korea beyond what is necessary for the protection of their respective settlements, except that Japan can maintain a strictly limited force to guard the telegraph overland from Fusan to Seoul; both recognize the sovereignty and independence of Korea, and agree to abstain from any direct interference in its internal affairs, and Russia undertakes not to hinder Japanese commerce there. Russia, however, has a concession from Korea for cutting timber in the valley of the Yalu, her North-Western boundary, and has acquired houses and land there as incidental to the grant (*Standard*, January 9).

VIII.—NOTES ON RECENT CASES (ENGLISH).

IT would almost seem that, in order to obtain a satisfactory decision on any point of copyright law, it is necessary to carry the case to the House of Lords. The Courts below—and the Court of Appeal is as open as any other to this criticism—appear to be the victims of phrases such as “To obtain copyright the book must be original,” or “must have literary merit,” or “There is no copyright in news,” or “There is no copyright in an abridgment,” or “There is copyright in a magazine apart from its contents,” and such like. For such phrases as these there is no substantial authority, either statutory or judicial, and plainly, when carefully considered, they have little or no meaning. One should have thought that the decisions of the House of Lords in *Walter v. Steinkopff* (L. R. [1892], 3 Ch. 489), and *Walter v. Lane* (L. R. [1900], A. C. 539), would have given these their quietus. “The times have been That, when the brains were out the phrase would die, And there an end; but now they rise again With twenty mortal murders on their crowns”; and even the solemn exorcisms of the House of Lords are ineffectual to lay them.

These somewhat depressing reflections are due to two recent decisions, one not yet reported, and the other reported only in the *Law Times Reports*. The former is the decision of the House of Lords in *Aflalo v. Lawrence & Bullen Limited*. In this case Joyce, J., held (L. R. [1902], 1 Ch. 264), that where a publisher retains a writer to write articles for an encyclopædia and pays him for his labour, the publisher does not thereby acquire the copyright (*i. e.*, the property) in the articles, which remains in the writer. This decision was affirmed by the Court of Appeal, Vaughan Williams, L.J., dissenting (L. R. [1903], 1 Ch. 318). In commenting on these decisions we doubted whether they

could be reconciled either with common honesty or common sense, and enquired why the ordinary rule should not apply to copyright, "that the person who employs and pays a person to make or invent anything for him is entitled to the thing when made or invented." (*Law Magazine*, May 1902, at p. 346). No doubt the Copyright Act, 1845, requires that the writer should be employed on the terms that the copyright should belong to the publisher, but (we pointed out) as no one said that these terms must be express, "the sole point is, when a proprietor employs and pays a person for writing an article, and there is no express agreement one way or the other as to whom the copyright shall belong, what in ordinary circumstances is the fair inference?" And we submitted that the fair inference is, that the proprietor was to get the result of the work he paid for. (*Law Magazine*, May 1903, p. 351.) This, according to the newspaper report, is precisely the view taken by the House of Lords, who have unanimously reversed the decision of the Court of Appeal, and who did not think it necessary to call upon the plaintiffs to reply to the arguments of the respondents.

The second decision referred to is *Springfield v. Thame* (89 L. T. Rep. 242). The effect of the judgment of Joyce, J., in this case is shortly this, that when a sub-editor cuts down or condenses a news article, introducing no new matter whatever, and only such new words as are necessary to connect the retained parts of the article, the sub-editor and not the original writer is the "author" of the cut-down article, and the copyright of it is in him. For personal reasons it is not desirable we should criticise this judgment. We merely submit that the real test, whether the copyright in the cut-down article is in the original author or in the sub-editor, is not whether or not the article had literary merit, or whether or not there is copyright in news or copy-

right in an abridgment, but whether or not the cut-down article is a new work, that is, is or is not a reproduction literally or substantially of all or a material part of the original article.

During the argument in *Springfield v. Thame* the provisions in Lord Monkswell's Copyright Bill, giving copyright to "news" and "abridgments," were cited as evidence of the present state of the law of copyright. They really are evidence of the present state of the draftsman's knowledge of the law of copyright. The ignorance of parliamentary draftsmen is the most potent confounder of legal science known to the law. When will lawyers and legislators grasp the simple idea that copyright is the right to prohibit the literal or substantial reproduction of a published book—whatever its contents—which is original in the sense of being not a literal or substantial copy of some other published book?

Judges have frequently protested against *Weekly Notes* and other notes of cases being cited as authorities (see for instance, per Kay, L.J., in *In re Woodin*, *Woodin v. Glass* (L. R. [1895], 2 Ch. 309, at p. 318). It is, therefore, the more surprising to find Kekewich, J., disregarding a fully reported decision of so distinguished a judge as Kindersley, V.-C., which has often been followed since, on the authority of a *Weekly Note*. In *re O'Connell*, *Mawle v. Jagoe* (L. R. [1903], 2 Ch. 574), his lordship held that where a married woman is given a general power over property, such property comes within a covenant to settle after acquired property, unless the bequest contains a gift over in default of appointment. This decision is based on *Steward v. Poppleton* (W. N. [1877] 29), and is directly in conflict with the decision of Kindersley, V.-C., in *Townshend v. Harrowby* (27 L. J. [Ch.] 553); and of North, J., in *In re Lord Gerrard* (58 L. T. 800).

It is impossible to say with certainty what were the facts and the grounds of the decision in *Steward v. Poppleton* (*supra*), but it is to be noted that the gift appears to have been an absolute gift, with a general power of appointment added to the absolute gift. If so, the power of appointment was mere surplusage: one cannot have a power of appointment over property which is absolutely one's own. The gift, then, was in substance an absolute gift. This seems to be the view of the decision taken by North, J., in *Bowen v. Smith*, which Kekewich, J., cannot understand (L. R., 11 Eq. 279), and is in accordance apparently with the decision in *Foxwell v. Van Grutten* ([1900], W. N. 97), where the words of gift were almost identical with those in *Steward v. Poppleton* (*supra*).

Two very useful and sensible decisions may just be noted. In *In re Somerville and Turner's Contract* (L. R. [1903], 2 Ch. 583), Kekewich, J., held that an equitable interest in copyholds on the death of the owner vests, under the Land Transfer Act, 1897, in his executors or administrators. This seems in accordance with the intention of that Statute, and also with the elementary principle that equitable estates in land are not the subject of tenure. In *Montefiore v. Guedalla* (L. R. [1903], 2 Ch. 723), Buckley, J., held that there is no rule that the donee of a power to appoint trustees cannot appoint himself. He should not as a rule do so, but in a proper case he may, and the Court will approve the appointment.

Lambourn v. McLellan (L. R. [1903], 1 Ch. 806), which we doubted in our August issue (Vol. 28, p. 477), has since been reversed by the Court of Appeal (L. R. [1903], 2 Ch. 268). The case turned on the interpretation of a covenant as to fixtures contained in a lease of a messuage for the specific purpose of being used as a boot manufactory. The covenant was to the effect that on the expiration of the lease the lessee would

yield up the demised premises, together with a number of things which, in so far as they could be considered fixtures at all, were undoubtedly all what are usually regarded as landlord's fixtures. Then followed the general words "and all other erections, buildings, improvements, fixtures, and things which then were and which at any time during the said term should be fixed, fastened, or belong to the said demised messuage and premises or any part thereof." Kekewich, J., felt compelled to hold that machinery for the manufacture of boots, which the lessee had during the term erected on and affixed to the premises, passed under this covenant to the landlord. The Court of Appeal unanimously reversed this decision, though two of the learned Lord Justices (Romer and Cozens Hardy) admitted that they had great doubt about the case during the argument. It is well, however, that in the result neither of them dissented from the rule laid down by Vaughan Williams, L.J. (at p. 277), and based on *Bishop v. Elliot* (11 Ex. 113). That rule is, that "when a house is let to a tenant for the purposes of a trade, if the landlord wishes to restrict his tenant's ordinary right to remove trade machinery or fixtures attached to the demised premises so as to be more conveniently used, and not placed there as an addition or improvement to the premises, the landlord must say so in plain language. If the language leaves the matter doubtful, the ordinary right of the tenant to remove trade fixtures will not be affected."

The strong (but in this case quite proper) regard which the law or the law Courts have for "vested interests" appears from the decision of the Court of Appeal in *In re Cobbold, Cobbold v. Lawton* (L. R. [1903], 2 Ch. 299). There a testatrix by her will left the income of £1,000 to A. for life, and on his death directed that the £1,000 should be divided between his children equally, but in case of his death "without leaving any child or children," then over.

The testatrix knew at the date of the will that A. had children. One of these survived the testatrix but died before A. Query, did A. die "without leaving any child or children"? Byrne, J., held that he did, and that the gift over took effect. Apparently he held so on the ground that the only alternative to reading "without leaving any child or children" as "without leaving any child or children him surviving" was to read it "without having had any child or children." It was clearly impossible to impute the latter meaning to the words, since the testatrix knew when she used the words he had children. But in the Court of Appeal it was pointed out that what the testatrix might reasonably be held to intend was, "without any child or children surviving herself, and taking therefore a vested interest under her will." In all probability the testatrix had never heard of vested interests, and so far as she had thought out how she wished the legacy to go had simply meant what she said. But the disinclination of the Court to take away any interest clearly given prevailed, and it was held that A.'s widow and children were entitled to the money—a very satisfactory result of the operation of a very technical rule.

In *Cowper v. Laidler* (L. R. [1903], 2 Ch. 337), there is a very interesting discussion of the question when an injunction to restrain interference with ancient lights must issue, and when the Court is entitled to give damages instead of such injunction. It may be permitted, however, to protest very strongly against the views expressed by Buckley, J., as to how the jurisdiction to give damages in lieu of an injunction should be exercised. His lordship said, that if in the case before him he had jurisdiction to give damages in lieu of an injunction, he would not do so, because there was a substantial interference with the plaintiff's rights to light, and the only extortion alleged against him was that he

asked for an injunction to compel the defendant to buy him out at an unreasonable price or to keep his buildings down. This, his lordship said, was not extortion at all, since every person was entitled to ask that price for his property which, for exceptional reasons, it in fact commands. This view seems to us based on a complete misconception of the grounds upon which the law allows easements to be acquired. Easements are permitted, not for the purpose of inflicting penalties on the owner of the servient tenement, but for the purpose of permitting the owner of the dominant tenement to enjoy the full use of his messuage. The only conceivable object of Lord Cairns' Act was to allow the Court, where the dominant tenement was only slightly injured by the interference with its easements, to give compensation, instead of preventing the owner of the servient tenement making the best use possible of his land. Where damages under it are given, upon what principle are they to be assessed? According to the view of Buckley, J., they should be assessed on the principle of compensation, not for the injury done to the dominant tenement, but for injury their existence might be made to inflict on the servient tenement. A further observation of Buckley, J., is no better founded. In reply to the argument that the plaintiff's property was greatly depreciated in value by the enforcement of the easement, he said that the plaintiff had paid less for it in consequence. Surely this merely amounts to saying that the loss did not fall on him but on the previous owner? Does it matter much who bears it?

The view held by Buckley, J., is admirably adapted to prevent public improvements in our towns. But it must be admitted that, whether his view is legally correct or not, the law as to rights of light and air is badly in need of alteration. As it stands, it constitutes a serious obstruction both to public improvements and to public health. This Mr.

Fletcher Moulton, K.C., pointed out some years ago, in a lecture delivered before the Royal Institute of British Architects. Whether the law as it stands on the decisions would come scatheless out of a fight in the House of Lords, seems very doubtful, in view of the mode in which that august tribunal received the decision of the Court of Appeal in *Chastey v. Ackland* (L. R. [1897], A. C. 155). It is a matter of extreme regret that that case was not carried to judgment.

J. A. S.

Hambro v. Burnand and others (L. R. [1903], 2 K. B. 399; 72 L. J. R. (K. B.) 662; 89 L. T. R. 180) deals with a claim founded on the use by a person, for his own exclusive benefit, of an authority given him to underwrite in the name of others and on their behalf; but beyond the interest of the circumstances, the case is noticeable for a considered and exhaustive judgment of Bigham, J., which, if it gives no new interpretation of law, states in a lucid manner the conditions under which a principal may, through the doctrines of ratification or estoppel, be bound by a contract made by a person purporting to act as his agent. Of course, untouched by either doctrine is the case where the agent has full authority for what he does. But where an unauthorized person enters into a contract in the name of another, something of no less importance than original acquiescence must be done by the unassenting person before he can be fixed with the responsibility of a principal; and the liability can arise only in two ways, namely, first, where he subsequently ratifies the agent's act; and here "the ratification requires full knowledge of the acts ratified, or such an unqualified adoption as to authorise the inference that the principal would take upon himself the responsibility for such acts." Second, where he holds out the unauthorised agent as having authority, and thereby induces the other party to contract; and in this case comes in the doctrine of estoppel, whereby

a man is required to admit as truth what he knows to be untrue, as one of the most epigrammatic of past judges called it. But where, as in the case the subject of this note, no ratification and no holding out have occurred, "an agent to make contracts on behalf of another has no power by his own unauthorised falsehood to create an estoppel against his principal." But as Lord James said in *George Whitchurch Limited v. Cavanagh* (L. R. [1902], A. C. 117), though "there is on one hand a risk cast on the public who rely on the honesty of agents, how far greater would be the risk of the principal if he were to be liable for the frauds of an agent?" Mr. Bigelow claims, as Mr. Campbell notes in *Leading Cases*, that the principle of estoppel *in pais*, as set out in *Pickard v. Sears*, 1837 (6 A. & E. 469), "had been declared and enforced several years earlier in America."

The House of Lords, in *Capital and Counties Bank Limited v. Gordon*, and *London City and Midland Bank Limited v. the same* (88 L. T. R., H. of L. 574) have confirmed the main points of the decision of the Court of Appeal which was noted in this Magazine for May, 1902 (Vol. 27, No. 324, p. 348), under the title by which the case was at that stage reported, of *Gordon v. London City and Midland Bank*. It is therefore now established law, that a bank which places to the credit of a customer a cheque on another bank paid into his account, without waiting for the cheque to be cleared, does so at its own risk, and will not be protected by sect. 82 of the Bills of Exchange Act, if it should turn out that the customer's title to the cheque is defective. It would be difficult to over-estimate the consequences to the commercial world of this decision, and, to remove the impediments to business which must arise in many cases, a Government Bill was hastily brought in which, in its single clause, proposed to enact that "a banker receives payment of a crossed cheque for a customer within the

meaning of section 82 of the Bills of Exchange Act 1882 notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof." But the Bill had to be withdrawn owing to insufficiency of time.

Another case which, on account of its great importance, was noted in an earlier number (Vol. 28, No. 328, p. 224), although it was known at the time that it would be the subject of appeal, namely, *The Corporation of Sheffield v. Barclay and others* (L. R. [1903], 2 K. B. 580), has now (89 L. T. R. 227; 72 L. J. R. [K. B.] 777) been considered by the superior Court which has reversed the decision of the Lord Chief Justice. The Court of Appeal has ruled that no contract of indemnity is raised by a request to someone to do an act which it is his duty to do independent of request; and therefore that when a purchaser of stock or shares of a company sends in the transfer, he neither indemnifies the company against forgery of the vendor's signature nor warrants the execution of the document. The judgment, which is convincing in law, will be received with general satisfaction. If the original decision had been affirmed, the Stock Exchange could hardly have carried on its business. In the majority of transactions the purchaser knows nothing of the vendor, and when a sale is made from a joint account even the vendor's broker would seldom be in a position to vouch for more than one signature. A banker who pays a forged cheque suffers the loss, and his examination of the signature which purports to be his customer's has to be done rapidly. But the registration of a transfer is a deliberate process in which officials and directors both take part; and they can appeal to the vendor in any way they please. There is no reason why the responsibility of a company or a corporation, should, in this matter, be less than the responsibility of a banker.

The appeal cases¹ shown in footnote arose out of disputed liability on agreements entered into for the hire of rooms or of steam vessels from which it was proposed to view displays in connection with the Coronation, then fixed for the latter end of June 1902, but subsequently deferred in consequence of the illness of the King. The conditions of the cases vary. The object for which the hiring was entered upon was not always stated, but in all such undefined instances it was established by inference; where, in one case, it was stated, it included a purpose which could have been attained notwithstanding the postponement of the ceremonies; in another, the subject of the hiring was put to profit by the owner after the hirer had repudiated the contract; a deposit was sometimes paid, and sometimes full payment was required to be made on a date which was earlier than that on which the postponement was announced: but of course in no instance had it been provided that the bargain was to be contingent on the original programme of the spectacles on land or sea being kept intact.

English law in such cases goes beyond the Roman law, and holds not only *rei interitu*, but, in the words of Vaughan-Williams, L.J., in *Krell v. Henry*, "by the cessation of an express condition of things which go to the root of the contract," the debtor's obligation is extinguished if he is not in fault. This was the doctrine of *Taylor v. Caldwell* ([1863], 3 B. & S. 826), and it has been frequently enunciated: for instance, very clearly by Brett, J., in *Jackson v. Union Marine Insurance Co.* (L. R., 8 C. P. 572), who said "where a contract is made with reference to certain anticipated circumstances, and where without any default of either party it becomes wholly inapplicable to, or impossible of appli-

¹ *Krell v. Henry* (L. R. [1903], 2 K. B. 740; 89 L. T. R. 328); *The Civil Service Co-operative Society Limited v. The General Steam Navigation Co.* (L. R. [1903], 2 K. B. 756; 89 L. T. R. 429); *Blakeley v. Muller*, and *Hobson v. Pattenden & Co.* (L. R. [1903], 2 K. B. 760); *Herne Bay Steam Boat Co. v. Hutton* (L. R. [1903], 2 K. B. 683; 89 L. T. R. 422).

"cation to, any other circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made." But though the parties may both be freed from obligation from the moment the contract fails, it does not follow that what has been previously paid under the contract is to be restored, and it was held in the present cases that the loss must remain where it was at the time of abandonment, and therefore that money payable prior to the abandonment could be sued for, but money payable subsequent to the abandonment could not, nor could money that had been paid be recovered back. In the case of the *Herne Bay Steam Boat Co.* it was held, that by the terms of the contract the venture was the defendant's, but inasmuch as the Company had, on the repudiation by the defendant, made use of the boat for their own profit on the day on which it was to be at his disposal, their receipts from such use were to be set off against the sum due from him under the contract. In the action against the General Steam Navigation Co., which was tried later than *Krell v. Henry*, it is significant that the Lord Chancellor, sitting in the Court of Appeal, seems to have concurred reluctantly with the decision in that case; for he said that, without overruling a considerable body of authority, he could not disagree with the decision he was then considering of the Court below, as that would, in effect, be reversing *Krell v. Henry*, which would be a reversal by the Court of Appeal of a decision which the Court of Appeal had just pronounced. Probably his Lordship was affected by doubts which had also presented themselves to Romer, L.J., in *Krell v. Henry*, namely, whether the parties could be said not to have had at all in their contemplation the risk of a change in the coronation arrangements.

T. J. B.

. IRISH CASES.

What was described as "an interesting question of legal archæology" presented itself for decision in *Parks v. Hegan* ([1903], 2 Ir. R. 643). Tenancy by curtesy has of course survived even the Married Women's Property Acts, though it emerges but seldom into practice. Its requisites are four: (a) the existence of a legal marriage; (b) issue born alive of that marriage capable of inheriting the lands in question; (c) the death of the wife in the husband's lifetime without having disposed of those lands; and (d) actual seisin of the lands by the wife during coverture if such seisin was attainable. There can usually be no doubt as to the first three requisites being fulfilled; as to the fourth there may be, and it was that which came into question in the present case. A., tenant in fee-farm, conveys his lands by deed to his daughters B. and C., but himself continues in sole possession. B. marries D. and has issue. B. and C. bring an action of ejectment against A., which is compromised on the terms that judgment for possession shall be entered, but shall not issue during the life of A., who thereupon continues in sole possession till his death. B. pre-deceases both A. and her husband D. Is D., on A.'s death, entitled to claim curtesy out of the lands? The King's Bench Division answer in the negative, on the ground that B. never had actual seisin. She plainly could not have it by force of the deed of grant to her, which, being at Common law and not under the Statute of Uses, could not have that effect without entry. Nor, in the opinion of the Court, did she acquire seisin by virtue of the recovery of judgment in the action of ejectment, inasmuch as execution thereupon was postponed and had in fact never issued. It was suggested that, after that judgment, A. must be looked upon as being in the position either of a bailiff or a termor, and that therefore his

possession would be in law the possession of his daughters. But whatever might have been the case if execution had followed upon the judgment, or anything in the nature of an attornment by A. during his lifetime, in the absence of these the argument could not hold. "If," asked the Court, "under the old law, a judgment in a real action, a levying of a fine, a suffering of a recovery, a judgment for rent, did not confer actual seisin without execution, why should an unexecuted judgment in the modern action of ejectment have greater effect?" In fact—and this alone seems sufficient to dispose of the case—"actual seisin" as opposed to "seisin in law" means corporal possession by oneself or one's representative.

Cases as to "clogging the equity of redemption" have been of rather frequent occurrence within the last half-dozen years, and have shown that a venerable rule of equity, despite the vigorous onslaught of Lord Bramwell in *Salt v. Marquis of Northampton* (L. R. [1892], A. C. 1), is still active. However, *Maxwell v. Tipping* ([1903], 1 Ir. R. 498) goes with other cases to illustrate the limits within which that rule now operates. The principles of equity on the point are fairly clear. If a transaction is really intended to be a mortgage, then that mortgage must be redeemable, and any stipulation purporting to make it irredeemable is void. This is *Salt v. Marquis of Northampton* itself. Again, in the days of the usury laws, equity declared in most emphatic terms that a mortgagee should not reserve to himself any collateral advantage which made his total remuneration for the loan indirectly exceed the legal interest. The Court's view on this subject is now-a-days altered, and apparently a mortgagee may now stipulate for a collateral advantage, provided he do nothing in regard to that stipulation which would make it void or voidable on general principles of equity, and provided, especially, it does not offend against

one further principle. That principle is, that no stipulation can be valid which prevents a mortgagee, on paying principal, interest and costs; from getting back his mortgaged property in the condition in which he parted with it. See per Lord Davey, in *Noakes v. Rice* (L. R. [1902], A. C. 32). In the present case, the agreement impeached as being a "clog" came about as follows:—Maxwell was indebted to Tipping for £1,500, which was secured (with interest at 5 per cent.) by mortgage on Maxwell's lands. In 1878, Maxwell, in consideration of a further advance of £300, executed a collateral agreement whereby he appointed Tipping his agent over the mortgaged lands, empowered him to charge agency fees, and agreed to pay 6 per cent. interest on the whole £1,800. The agreement did not charge the extra 1 per cent. interest on the lands. All question of undue influence or fraud was out of the case, and indeed the agreement had been suggested by Maxwell himself. He now by his action claimed (virtually) a declaration that the agreement as to the extra interest and the agency fees was void. It could hardly be said to fall within the third principle above mentioned, for so far as the original mortgage was concerned, Maxwell would apparently still have been entitled to redeem that on payment of the £1,500, with 5 per cent. interest and costs. The fact that Tipping had, as regards the £300, resorted to the procedure under the Irish Judgment-Mortgage Act, and thereby converted this debt into a statutory mortgage against the lands, could hardly affect the matter, inasmuch as this statutory procedure is *in invitum* of the debtor. Was the agreement, then, such a stipulation for a collateral advantage as ought to be set aside in equity, under the second principle above stated? The Court (Porter, M.R.) held not.

The gist of the foregoing decision would appear to be, that where an agreement is really *collateral* to a mortgage,

though made between mortgagor and mortgagee, and though concerning to some extent the mortgage security, then the mere fact that it gives some advantage to the mortgagee is not of itself a ground for upsetting it. That can only be done, if at all, by calling in aid some other recognised equitable principle, and showing that the agreement *per se* is unconscionable. But an agreement can never be held to be *collateral* if it has the effect of preventing the mortgagor getting back the thing mortgaged as it was when mortgaged, on payment of principal, interest and costs, and an agreement non-collateral in this sense is the real "clog" which the rule strikes off. If we are right in thus reading the cases, it will be seen that they have in substance worked round reasonably near to Lord Bramwell's ideal freedom of contract, and have left behind the old notion, from which this branch of equity is derived, that every lender is at heart a rogue.

O'Keefe v. Walsh ([1903], 2 Ir. R. 681) is an important decision, involving a point of substance although turning directly upon the interpretation of rules of practice. The action was for conspiracy to injure a man in the way of his trade, by boycotting him. It was brought against ten defendants jointly, and the report particularly concerns the position of one of them named Condon. O'Keefe, a trader in a country town called Tallow, took possession of an "evicted farm" in February 1899. In that year branches of the United Irish League were formed in Tallow and in the neighbouring district of Conna, in the working of which branches the defendants other than Condon were the local leaders. These branches denounced the plaintiff's conduct during the year 1899, and in consequence his trade was ruined. In June 1900, he came to some sort of settlement with the previous owners of the farm, and the boycott temporarily abated: but the Tallow branch of the League refused to recognise this settlement and again denounced

the plaintiff. There was no evidence as to the date when Condon became a member of the League, but he was proved to have been president of the Conna branch in September 1900: and it was also proved that in December 1900 he was instrumental in preventing the Conna branch from withdrawing itself from the action of the Tallow branch in regard to O'Keefe. The jury found that all the defendants maliciously agreed to induce, and did induce, persons not to deal with the plaintiff, and that such inducement caused him loss. They were asked to assess damages on the alternative suppositions that Condon was responsible for all the damages, or that he was only answerable for damages accruing from the action of the defendants after he joined the conspiracy; to this they replied, "£5,000 up to the settlement of June 1900, and £500 after settlement, when we consider that Condon joined the conspiracy," adding that the £500 was in addition to the £5,000, and that they gave no damages against Condon other than the £500 in any event. On these findings Palles, C.B. gave judgment against the nine defendants in respect of the causes of action prior to June 1900 for £5,000, and against the ten (including Condon) in respect of the acts done after that date for £500, and judgment for Condon as to the acts of which he had been acquitted. An appeal by Condon mainly raised the questions whether this segregation of damages was permissible in an action of tort, and whether the action was wrongly constituted in law as joining separate causes of action against separate defendants. The King's Bench Division and the Court of Appeal decided against Condon on both these points. In regard to the former point, *Dawson v. M'Clelland* ([1899], 2 Ir. R. 486), has certainly decided in Ireland that, in an action of damages for one distinct tort (libel), jointly charged and jointly found against two defendants, the damages cannot be apportioned. The Court, however, was of opinion that in the present case

the cause of action was "really one that accrues from day to day, somewhat like a continuing trespass or continuing nuisance, the wrongful agreement being its *fons et origo*. Thus, where there are several persons joining the conspiracy at different times, increasing its volume and momentum, there is not only a joint cause of action as against all, with possibly a varying liability to damages, but also separate rights of action against each, with necessarily a separate assessment of damages." But at the same time, these causes of action were not so separate that they could not (as in *Sadler v. Gt. Western Ry. L. R.* [1896], A. C. 450), be joined together in one action. The substantial ground of complaint, as distinguished from the technical causes of action, was the same conspiracy. The Court therefore thought that the present case came within the principle of which *Frankenburg's Case* (L. R. [1900], 1 Q. B. 504), is an illustration, wherein the existence of a "common ground of complaint" against different persons, although damage had flowed from each of those persons in different forms, was under the present practice sufficient justification for joining all those persons as defendants in one action.

The result of the decision, taken in connection with other recent cases on conspiracy, would seem to be as follows:—A conspiracy is not itself a cause of action apart from damage, though it may well be that it is the existence of a conspiracy which alone renders it possible to inflict the damage. Each separate accrual of unlawful damage, from separate acts of individuals done in pursuance of a conspiracy, is itself technically a distinct cause of action for which a Court may award separate and apportioned damages. But the conspiracy is a bond of union which unites all these separate inflictions of damage into one common transaction: and relief in respect of this whole transaction may apparently be claimed in one single action.

. Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER
LENGTH IN SUBSEQUENT ISSUES.]

Grain or Chaff? By ALFRED CHICHELE PLOWDEN. London : T. Fisher Unwin. 1903.

The sub-title of this work is "the autobiography of a police magistrate," and Mr. Plowden discourses pleasantly on the history of his ancient family, his relatives, schools, college career, professional experiences, and even some of his love affairs. He does not seem to have been very industrious, either at Westminster or Oxford, but must have made up for it in after life or otherwise he could not have attained his present measure of professional success. There is much that is interesting to lawyers in his account of sessions and circuit, and his style is throughout light and pleasant. The part of most interest to the public at large will be his experiences as a magistrate. He well describes the routine of a magistrate's work, and the various difficulties and responsibilities involved; which are much more heavy than a casual observer would suppose. He is able, from long experience, to point out many defects in our laws and suggest amendments, on the merits of some of which perhaps opinions will differ; but his remarks on the question of Police Court judicial separations, and habitual drunkards seem to us very true. We also invite attention to the remarks on the difficulty of holding the balance evenly between the police and the public. The whole book is eminently readable, and the learned Author will not disclaim for it, as he does for his "so-called jokes," the intention of sometimes provoking a laugh.

Commissioner Kerr. By G. PITT-LEWIS, K.C. London : T. Fisher Unwin. 1903.

Mr. Commissioner Kerr was "an individuality," as Mr. Pitt-Lewis describes him on his title page, and a strong one. For a long series of years he did an enormous amount of good work at the City of London Court. He combined sound legal knowledge with strong common sense, and by his decided views, and the racy vernacular in which he expressed them, excited greater interest and attention than perhaps the views themselves always merited. Mr. Pitt-Lewis, who

knew him well, and for years sat as his deputy, has performed his task in a thorough but not blindly appreciative spirit ; but we cannot help thinking that his style is a little too discursive, which has led him into a discussion of some subjects of a personal nature not altogether connected with Mr. Commissioner Kerr's career. We have no doubt in the great majority of cases his judgments were right ; but we agree with Mr. Pitt-Lewis in regretting that he too frequently ignored Bentham's maxim "that justice should *seem* to be done, is better even than that it should be actually done."

The History of Liquor Licensing in England principally from 1700 to 1830. By SYDNEY and BEATRICE WEBB. London: Longmans, Green & Co. 1903.

Mr. and Mrs. Sydney Webb's writings on social and industrial subjects are well known, and we are glad to see them devoting their ability and industry to legal history. The present little volume forms part of a much more important work on English Local Government during the eighteenth and nineteenth centuries, on which the Authors are engaged. The present "chapter on the regulation of the Liquor Traffic" is offered as possibly contributing "towards an understanding of the present problem." It will be noticed that the work purports to be a history of the period between 1700 and 1830, but to make this intelligible it is supplemented by a short introduction, and a summary of licensing legislation since 1830. It is very interesting to notice the variations in the amount of control exercised over licensed houses by the justices. We are able to compare the strict supervision of the Privy Council and the Judges of Assize, with the period of laxity which set in at the end of the seventeenth century, and which is partly at any rate attributable to the action of the Government who thought mainly of revenue. The most interesting part of the book, however, is that which deals with the most remarkable episode in the whole history of public-house licensing in England, the sudden and almost universal adoption by County and Borough benches of a policy of restriction and regulation lasting only for half-a-dozen years. This episode, which the Authors are the first to unearth and describe, included "the deliberate and systematic adoption, by benches of magistrates in different parts of the country, of such modern devices as Early Closing, Sunday Closing, the Refusal of New Licenses, the Withdrawal of Licenses from badly constructed houses, the peremptory

closing of a proportion of houses in a district over-supplied with houses, and in some remarkable instances, even the establishment of a system of Local Option or Local Veto, both as regards the opening of new public-houses and the closing of those already in existence, all without the slightest idea of compensation." The manner and extent of this regulation, its effects, and its abandonment, under the influence of liberal ideas of Free Trade in Beer, are clearly and vividly described, and are well worth the perusal of all those who are interested in Licensing questions.

Selden Society. Year Books of Edward II. Vol. I. Edited by F. W. MAITLAND. London: Bernard Quaritch. 1903.

Professor Maitland in his learned preface points out the importance of the Year Books, and discusses their origin, which he considers to have been the outcome of private enterprise, and he suspects that they were made "by learners for learners, by apprentices for apprentices." He deals at some length with the defects of the old editions, and makes a strong appeal in favour of a new and worthy edition of the Year Books being undertaken as a national enterprise, lest England "stand disgraced among nations, and our Year Books figure as monuments of Germanic Law, or a French dialect." The longest part of the introduction, and one of the highest value to anyone attempting to read the manuscripts in the original, is a learned discussion of the Anglo-French in which the early Year Books are composed. The cases are given in French and English on alternate pages. On the English pages are head-notes of the Editor bringing out the legal interest of the case, and the cases are often followed by notes from the record which further explain them. It is of great interest to see how cases were argued nearly 700 years ago, and most instructive to observe the growth of our law.

Comparative Principles of the Law of England and Scotland. By J. W. BRODIE-INNES, B.A., LL.M. Edinburgh: William Green & Sons. London: Stevens & Sons. 1903.

This large and well-printed volume, containing something like a thousand pages, is only the first part of the work which Mr. Brodie-Innes has projected, and is limited to the subjects of Courts and Procedure. The aim of this great work is best explained in the

Author's own words. It is intended as an "interpreter between the two systems of English and Scottish law. It is not, of course, intended to enable an English practitioner successfully to conduct an action in the Scottish Courts or *vice versâ*; my aim has been merely to enable him to give preliminary advice to a client whose interests involve the law of the other country, to understand what his rights are, and how they can be enforced according to the system of that country, and to give intelligible instructions for such enforcement." It is no doubt useful to be able, when necessary, to refer to a good book on the law of another country; but very few practitioners would be bold enough on the strength of such an authority to give advice, at any rate on the practice. Another object is to give assistance to those concerned with amending and improving the law and the practice thereof in both countries. No doubt many useful suggestions may be and have been got, by comparing systems of procedure, and we hope the Rule Committee will not neglect the opportunity now presented to them. This volume deals with all the Courts, superior and inferior, in England and Scotland, describes shortly their history and development, and compares their jurisdictions and procedure. Many interesting resemblances and differences are to be noted, and many strange-sounding terms of Scottish law are explained to us. Among these we specially refer to *Multiple-pounding*, a term long dear to us, though absolutely ignorant of its meaning, and which we believe we first came across in the fascinating pages of *The Wizard of the North*. We now learn that it "is the most characteristically Scottish and the most plastic of all the Scottish forms of process." Mr. Brodie-Innes also correctly adds, "It is, however, the action which is least understood as a general rule in England." Another curious point is the history of trial by jury in Scotland, which fell wholly into disuse in the sixteenth century, and was not re-established till 1815. A marked feature of this work is the list of standard text-books on the several subjects in each country prefixed to each title. The accuracy, on the whole, is remarkable in ranging over so wide a field, but we notice a few errors in the English practice. The plaintiff is no longer able to select his own venue: it is not the practice on trials by a jury for the junior on either side to sum up if his leader is present: the Central Criminal Court is not an inferior Court, as rather seems suggested on page 255.

The Annual Practice, 1904. By THOMAS SNOW, CHARLES BURNEY, and FRANCIS A. STRINGER. 2 Vols. London: Sweet & Maxwell.

The Yearly Supreme Court Practice, 1904. By M. MUIR MACKENZIE, T. WILLES CHITTY, S. G. LUSHINGTON, M.A., B.C.L., and JOHN CHARLES FOX, assisted by A. C. MCBARNET and ARCHIBALD READ. London: Butterworth & Co.

The A. B. C. Guide to Practice, 1904. By FRANCIS A. STRINGER. London: Sweet & Maxwell.

These well-known books of practice are with us again, and there is not much to be said about them which we have not often said before. Their respective advantages are apparent to those who use them, and it is very much a choice between one volume and two. We have not many additions to notice this year, the most important being the rules of 1903 dealing with indorsements on writs in libel actions, service of notice of writ in foreign country, and a rather important departure in the new procedure for obtaining evidence for foreign tribunals. It will be noticed that the list of Editors of the *Yearly Practice* has been increased and strengthened by the addition of Master Chitty. In the *Annual Practice* there are some new and useful Tables which may be shortly described as Tables of Appeal, Tables of Judgments and Orders, and Tables of Execution. All these have been arranged by Mr. Manson. We might also call attention to the valuable notes on Taxation of Costs, supplied by Master King. Many of the notes have been revised and re-written.

Mr. Stringer's handy little *A. B. C. Guide* has been enlarged and has added to it a diary for appointments. Any more detailed information on points of practice can be found at once through the invariable reference given therein to the correct page of the *Annual Practice*.

Rating Forms of Notices of Objection and Appeal. By W. L. L. BELL. London: Sweet & Maxwell. 1903.

This will prove an useful addition to any of the standard works on Rating, as it contains a very large number of forms and grounds of objection: in fact, the Author claims that it contains every ground of objection or appeal, and all the forms. There is a number of notes to enable the reader to work out for himself the many difficult points connected with rating practice, which the size of the work prevents Mr. Bell from fully discussing.

The Annual County Courts Practice, 1904. 2 vols. in one. Edited by WILLIAM CECIL SMYLY, K.C.; LL.B., and WILLIAM J. BROOKS, M.A. London: Sweet & Maxwell.

It is indispensable for all who practice in County Courts to have an annual book of the practice, and no one can have a better guide than that produced by Messrs. Smyly and Brooks. There has not been much legislation or many important cases affecting County Court practice in the last year, but what there has been will be found here. The most important addition seems to us to be the Rules and Forms of 1903, which came into operation at the beginning of the New Year. It is most important to have these and have them noted and explained, though it is satisfactory to learn that they "do not make any startling alterations in the practice, as the additional rules are mostly taken from the High Court Rules, and provide for procedure and practice in matters as to which the old Rules were silent." An addition which is certainly an improvement is that of giving the dates of all the cases cited. The County Courts Act 1903 is given in the Appendix to the first volume, though it does not come into operation till the 1st January, 1905; so a whole year is given us to ponder over and consider its probable effect. The number of cases decided under the Workmen's Compensation Acts seems to have diminished.

Paterson's Practical Statutes, 1903. Edited by JAMES SUTHERLAND COTTON. London: Horace Cox. 1903.

Mr. Cotton has brought out his annual volume earlier than usual, probably in consequence of the lightness of his task. Out of forty-seven Public Acts passed in the last Session only twenty-seven are dealt with. None of these is very long, and several are not very important. Those of most interest are the Borough Funds Act: Pistols Act: Education (London) Act: Motor Car Act: Poor Prisoners' Defence Act: Housing of the Working Classes Act: County Courts Act: and Employment of Children Act. The notes are, as usual, clear and instructive, and in the case of the Pistols Act, severe. It must be remembered, to explain the apparent inactivity of the Legislature, that in this Session was passed the Irish Land Act.

How to understand the Balance Sheet. By a CHARTERED ACCOUNTANT. London: Jordan & Sons. 1903.

This work is intended for the benefit of the investing public, in particular the shareholder in a limited company, and if he carefully

peruses the explanation of the parts and the meaning of an ordinary balance sheet given in popular language, he will at any rate be able to take a more intelligent interest in his property than he did before, and this may have a good effect on the conduct of the business.

A Calendar of the Middle Temple Records. Edited by CHARLES H. HOPWOOD, K.C. London: Published by order of the Masters of the Bench, and sold by Butterworth & Co. 1903.

This interesting volume consists of extracts selected from the Records of the Middle Temple, with suitable notes. We are glad to notice it is only preliminary to other volumes which are intended to be issued, containing a translation of the "Minutes of Parliament" between 1502 and 1703, under the superintendence of Mr. C. Trice Martin, of the Public Record Office. There is unfortunately a gap in the Minutes from February 1524 to February 1551, but otherwise the Minute Books are complete to the current volume. Judging from the extracts which Mr. Hopwood has selected, these books contain innumerable entries of interest as to the government of the Inn, the erection of the buildings, the efforts of the governing body to enforce the study of the law and control their somewhat unruly members. Again and again we find a member expelled for misconduct, and then re-admitted on penitence and submission. We do not find many disputes with the Inner Temple, the principal one being a somewhat unseemly difference as to the precedence of the members of the two Inns in the administration of the Communion. There was evidently at one time a difference of opinion between the Bench and the younger members as to the observance of Christmas, and we find several instances of Christmas having been kept in a manner contrary to the order of the Bench, and also excesses caused by the "Lord of Misrule." There is a certain number of curious sumptuary ordinances. We find many references to Masques and Plays, but no reference to the acting of *Twelfth Night* on Christmas 1601. We are sorry to note for the credit of the Temple that the first attempt we know of to raise volunteers from their members, in 1617, seems to have been unsuccessful, owing to there being "no willingness nor ability" to offer themselves. There are many interesting items among the accounts, and we notice forced loans for building the Hall in 1576, although there is no reference to the Queen having opened it in person. Many years afterwards,

in January, 1671, we find an order that "doors shall be made to the screen in the Hall," and in the accounts for the same year two sums of £5 for carving the doors. There are curious items for "infants exposed maintained," music, law suits, clock, bills, and many more which we have not space to refer to. We shall look forward with interest to the complete work.

The Winding Up of Companies. By F. GORE-BROWNE, M.A., K.C. London: Jordan & Sons. 1904.

The Winding Up Rules came into operation on the first day of the present year, and as the result is to supersede all the previous Rules and Regulations, it is of great importance to practitioners to have at hand as soon as possible a text-book which will give correct references to the Rules which have now been altered, and will call attention to the various changes which have been made in practice and procedure, or in any other matter. Such a book Mr. Gore-Browne has provided with commendable despatch. The whole work is carried out with that care and accuracy which characterise Mr. Gore-Browne's work; and we notice none of the traces of hurry in "the form and style" for which he apologises.

A Code of the Law of Compensation. By SYLVAIN MAYER, Ph.D. London: Sweet & Maxwell. 1903.

Second Edition. *The Law of Compensation.* By J. H. BALFOUR BROWNE, K.C., and CHARLES E. ALAN, M.A., LL.B. London: Butterworth & Co. 1903.

Mr. Mayer's preface contains no reference to the fact of there being already more than one well-known treatise on the important and difficult branch of law which he has selected for treatment; in fact, his "hope that it may throw some light upon a subject, the intricacies and refinements of which are rarely equalled, and certainly not surpassed by any branch of our law," rather sounds like the bold aims of one who is exploring hitherto unknown regions. The subject of compensation is, however, of sufficient importance to justify some new books. The trend of public and municipal enterprise seems more likely to increase its importance in the future than diminish it. The form Mr. Mayer has selected is that of an annotated edition of the Land Clauses Acts and other Statutes relating to the compulsory purchase or injurious affecting of land.

The annotations take, however, a rather unusual form. The notes on each section are formulated into articles, each of which is followed by the cases which support, or illustrate it, and with references to the practice on the point discussed. As instances, after sections 63 and 68 of the Lands Clauses Act 1845, come respectively 16 and 25 articles, many of them followed by long lists of cases. It is perhaps a convenient way of stating the effect of each section, and it may be the reason why the Author entitles his work a Code, but this hardly makes it one. The greater part of the book is taken up by the Lands Clauses Acts and the Railway Clauses Acts, but we have also Waterworks and Gasworks Acts; Local Government Acts; Public Health Acts; and a number of miscellaneous Acts, of which the most important is perhaps the Housing of the Working Classes Act 1890, and the last the Metropolitan Water Act 1902. A great deal of useful information is contained in the Appendix; such as a collection of over fifty forms and a number of Acts and Rules. Special features are a collection of specimens of valuations, and some useful valuation tables. The book is well got up, and bears marks of industry and care. We notice one small mistake in the Index, where, under the heading Poor-rate, we find "Promoters to make good deficiency where land taken is exempt from," which is exactly the opposite of what is stated in the article referred to.

Messrs. Balfour Browne and Allan's work has already made its reputation, and a new edition is welcome when we consider that, since the issue of the last one in 1895, something like two hundred decisions have been given, and seven or eight Statutes passed connected with the subject. What Mr. Balfour Browne does not know about compensation "is not worth knowing," and his probably unrivalled experience gives him special advantages in dealing with cases in so many of which he has been engaged. A practical experience like his enables him to see the real question at issue in disputed cases, and to point out the best way of dealing with it. A large number of Statutes are given besides the regular Land Clauses and Railway Clauses Acts. In spite of all their efforts the Authors are obliged to confess, not infrequently, that a point is doubtful, or a decision is doubtful, but this is not their fault, and is inevitable in a subject of so wide a scope and such complexity. Interesting additions in the Appendix are the unreported judgments in *In re Riddell and the Newcastle and Gateshead Water Co.*, and *Ossalinsky*

v. *Manchester Corporation*, and the extract from Lord Shand's finding in the arbitration between the Corporation of Edinburgh and the North British Railway Company.

Second Edition. *The Judicial Dictionary.* 3 Vols. By F. STROUD. London: Sweet & Maxwell. 1903.

This unique and most valuable work has been considerably added to, and although the additions add considerably to its usefulness they render its title of the "Judicial Dictionary" not quite so correct, as the statutory definitions of the High Court of Parliament cannot exactly be called "judicial." It is, however, of the greatest assistance to be able at once to put one's hand on the reference to every Act in which a definition of the word one is interested in is to be found. The learned Author has been fortunate enough to be allowed access to valuable MS. Word-Books belonging to Lord Lindley, Mr. Justice Gainsford-Bruce, and others. It is in contemplation to issue periodical supplements "to keep the book up to date and further develop its idea." Mr. Stroud's work differs from all other legal dictionaries in this remarkable feature, that it is primarily a Dictionary, that is, its main object is, as set out in the Preface to the first edition, to be "a Dictionary of the English language so far as that language has received interpretation by the judges," and now may be added "by Parliament." Of course it has never been strictly limited to "Judicial" definitions, but they have also been taken from law works of repute. For instance, a very large number of the definitions of Criminal law have been taken from *Stephen's Digest*. We have also noticed numerous references to *Termes de la Ley*, *Blackstone's Commentaries*, etc. The amount of labour required to collect and arrange decisions on single words or short sentences is difficult to realise. At the very beginning of the first volume we find nearly two pages devoted to "A." Some of the most exhaustive and important headings are, "Child, Children" (which occupies over five pages), "Heir, House, Survivor." We have noticed no inaccuracies, nor are there many omissions, though perhaps "Bicycle" may be one of them.

Third Edition. *Real Property Law.* By W. H. HASTINGS KELKE, M.A. London: Sweet & Maxwell. 1903.

An epitome of Real Property law, intended for students and to be read "before and after some more copious text-book." It seems to us well adapted to the purpose, it covers the field well, is concise

and at the same time clear, and, as far as we have been able to test it, accurate. It cites some fifty cases, the table of which is at the end, not the beginning, and there is an adequate Index. One trifling slip is, that a case is cited as *Angus v. Dalton* in the body of the work, and as *Dalton v. Angus* in the table of cases.

Fourth Edition. *Symonds on Settlement and Removal.* By JOSHUA SCHOLEFIELD and GERARD R. HILL, M.A. London: Butterworth & Co. 1903.

The law of Settlement is difficult, and at one time mighty battles were waged between different parishes with all that noble pertinacity which distinguishes litigants when the costs do not come out of their own pockets. Those happy days—alas! for the Bar—seem to be over, but there are enough awkward points left to engage the attention of the Courts from time to time. This book, which has been before the public for some twenty years, does not purport to be “a complete digest of all decisions upon the subject,” but the intention of the original Author has been carefully kept in view, who designed it as a hand-book for “Clerks to Guardians, and especially to Chairmen and Members of Boards of Guardians, and others interested in the administration of the Poor Laws.” Many questions which were formerly much disputed, and on which there are numerous decisions, are now no longer of importance; but difficult questions enough remain, and to these the Authors give much consideration and devote their best efforts to answer them. The difficulty of some of these questions can be seen by referring to the Editors’ consideration of what was really decided in the *West Ham Union v. Bethnal Green Union*; and what the position is of a child over sixteen absent from home in domestic service. Other difficult problems arise on the construction of sect. 35 of the Divided Parishes Act 1876, and the Editors submit an opinion, on the possibility of a child under sixteen acquiring a settlement for itself, which is different from that commonly laid down. Another unsettled point is whether a woman can acquire a settlement by two years’ irremovable residence as a wife and one subsequent year as a widow. In this case also, the Editors hold an opinion as to the meaning of a part of Lord Watson’s judgment, which is different from that frequently held. Other doubtful points are referred to, such as the question whether the acquisition under the Poor Rate Assessment and Collection Act of a settlement is a “qualification or franchise.”

The point does not seem to have been decided, but the opinion of the Local Government Board is believed to be against it. They prudently advise a justice who is a guardian¹ for a removing Union not to adjudicate on the hearing of an application for a removal order, "though it is doubtful whether the order would be thereby invalidated." The Appendix gives a large number of Statutes and parts of Statutes, and the book all through is edited with great care and knowledge.

Fourth Edition. *Law and Practice of Rating.* By EDWARD JAMES CASTLE, K.C. London: Stevens and Sons. 1903.

A fourth edition of a well-known work first issued in 1879. It contains much information, and much judicious criticism, but we are afraid that on the whole we cannot praise it as much as we could wish. We think in the first place that Mr. Castle does not always do as much to assist his reader as the latter is entitled to expect. We notice instances where he has contented himself with pointing out difficulties without attempting a solution of them. As an illustration, we may refer to his treatment of the difficulty of valuing the Oxford University buildings, which he says truly are to be rated upon the rent at which they would let on a yearly tenancy. He goes on to say "the difficulty is to find what that is, as they are not in the market, have no profits to justify a rent, and being old historical buildings, it seems hardly right to assume a tenant could be found to pay a rental upon their present structural value." This is all very true, but it is not much assistance to the person who is trying to arrive at what *is* the true value. A similar remark seems to us to apply in a modified degree to his treatment of the rating of country mansions², which subject he goes into at some length, and concludes that the tribunal has to "ascertain the value of the occupation to the existing occupier, and they must find this value from all the circumstances of the case, in some cases looking to the cost of construction, in others to the accommodation, or to the amount of use made of the premises, as the justice of cases requires." Is this statement quite correct? Is not the question to be solved the value to the hypothetical tenant including the existing occupier as eligible? And does the summary help the inquirer much? If, however, we are wrong in criticising Mr. Castle for over-caution in dealing with difficult and debatable questions, we cannot refrain from pointing out that this edition affords another ground for criticism. It

seems to us that a sufficient amount of care has not been devoted to the revision of proofs and accuracy of references. There is a considerable number of mistakes which are obviously more or less clerical ; such as the insertion of an unintelligible "she" in the notes on *Gage v. Wren* on page 64, and the meaningless words "in the Author's opinion" on page 548. But there are other mistakes which are more serious ; such as the reference to only the report in the Court of Appeal of the very important case of *Halkyn District Mines Drainage v. Holywell Union*, and no reference to the fact that the case went to the House of Lords and is reported in all the principal Reports. Mr. Castle must have been aware of this, as he gives the effect of the judgment of the House of Lords which reversed the decision of the Court of Appeal. Again, in the recent case of *New River Co. v. Hertford Union*, he seems to be unaware that the decision of the King's Bench Division was reversed in the Court of Appeal. Nor have we been able to find a reference to the recent case decided by the House of Lords of *Mersey Docks v. Birkenhead*. The note on *R. v. Essex J.J.*, does not seem quite correct, as apparently the Lord Chief Justice gives judgment on the second question, which was "whether, when the assessment of third parties was objected to, it was necessary to bring them before the assessment committee," and then goes on to say it was not necessary to decide it. We have not been able to find the exact words attributed to the Lord Chief Justice in any of the Reports cited, and we think the reference to sect. 28 of the Act of 1862 must be a mistake for sect. 18.

Fourth Edition. *A Treatise on the Law of Extradition.* By Sir EDWARD CLARKE, K.C., and E. PERCEVAL CLARKE. London : Stevens & Haynes. 1903.

The first edition of *Clarke on Extradition* was published about seven and thirty years ago, and now with the production of the fourth edition of the standard work which helped to make his fame, Sir Edward has the pleasure to associate his son. The law of extradition has been rather slowly developed, and has never reached the full measure of the principles laid down in Chancellor Kent's decision in *Washburn's Case*, where that great judge held that it was the duty of a State, irrespective of all treaties, to surrender fugitive criminals. In dealing with the history of the modern law and practice of extradition, the place of honour is

given to the United States. The practical difficulties of the question were discovered immediately after the formation of the Union ; and the learned author bestows this high and well-deserved praise on the American judges. "The American judicial bench has been adorned by men who added the lawyer's knowledge to the statesman's thought, and who, bringing both to bear on the questions of public law, have left us works of enduring value. In the matter of extradition, the American law was, until 1870, better than that of any other country in the world ; and the decisions of the American judges are the best existing expositions of the duty of extradition, in its relations at once to the judicial rights of nations and the general interests of the civilisation of the world." The cases in Canada are also fully dealt with, and the powerful judgment of Drummond, J., in *Paxton's Case*, is given in full in the Appendix. England's record is not a very brilliant one. France found that her Convention with England was unworkable and a complete failure, as her demands for extradition were almost invariably unsuccessful. The result of her remonstrances, and the recommendations of the Committee on Extradition Law, was the passing of the Extradition Act of 1870 ; which was "a comprehensive and ably drawn code of law," and remedied many defects "pointed out in the first edition of this work." While the improvements made by this Act are admitted, the later Act of 1873 is criticised with severity, as is the case of *R. v. Millins*. The law of France is considered at considerable length ; and the rules of practice in all the different countries are given. The whole forms a very complete exposition of the law and practice in the United States, Canada, Great Britain and France. The Appendix contains, among other information, the English and Canadian Statutes, and a list and the text of existing British Extradition Treaties. It is curious to note in looking over these that the Treaty between Great Britain and the United States is the only case in which the contracting Powers do not except their own subjects, although in two Treaties, namely, with Spain and Switzerland, Great Britain makes an one-sided agreement to deliver "all persons."

Fifth Edition. *Notes on Perusing Titles.* By LEWIS E. EMMET. London : Jordan & Sons. 1903.

We are not surprised at the last edition of this work having been so soon exhausted. It only came out in 1895, and now it has reached

its fifth edition. It thoroughly carries out its original design "as a practical book by a Solicitor in practice for other Solicitors in practice," and must be of the greatest value in a Solicitor's office. Attention is clearly directed to a number of doubtful points, such as whether a signature by initials is sufficient: whether sub-section 3 of sect. 3 of the Conveyancing Act of 1881 "prevents a purchaser from insisting on being supplied with a copy of restrictive covenants contained in a deed before the root of title, which covenants are incorporated in a deed later than the root by reference." On this last question Mr. Emmet "with great deference" dissents from the opinion of an eminent counsel. A very useful chapter is the fifth on the effect of misrepresentation, misdescription, etc. As regards the very difficult subject of Covenants in connection with outgoing, the Author can merely state that the law is in a state of transition, and refer the reader to an able article in the *Law Times*. We notice that attention is called to the doubtful point whether a trustee retaining deeds can be compelled to give an undertaking for safe custody, and the opposite opinions of Messrs. Hood and Challis and Mr. Whitcombe are given. Mr. Emmet apparently agrees with the latter. In conclusion, we may call attention to the excellent list of Reminders intended to be read in connection with the fuller Notes.

Seventh Edition. *Shirley's Leading Cases in the Common Law.* By RICHARD WATSON, LL.B. London: Stevens & Sons. 1904.

The continuing popularity of *Shirley's Leading Cases* is the best testimony to its merits. Originally designed for students only, it has in the course of time developed into a work containing a large amount of legal information grouped under well-selected cases. We have looked through a good deal of it, and all the recent cases of importance seem to be noticed where necessary. We have found no inaccuracies except one in the note on *Appleby v. Franklin*, the point in which is quite missed. We believe the same mistake was made in the last edition.

Twelfth Edition. *The Bills of Sale Acts.* By HERBERT REED, K.C. London: Waterlow Brothers & Layton. 1903.

This is well known as the book on a very difficult branch of law. The ingenious interlacing of the sections of the different Acts produces as near a Code as can be done in the present condition of

the law. No new legislation has taken place since the last edition (1897), but all the cases decided since—some fifty or sixty—have been noted. In the Table of Cases the date of each decision is given.

Fourteenth Edition. *Stephen's Commentaries on the Laws of England.* Vols. I—IV. Edited by EDWARD JENKS, M.A., B.C.L. London: Butterworth & Co. 1903.

Mr. Jenks has had the courage to distinguish the first edition of his editing by a bold departure. He has realised that the powers of no one Editor, however learned and industrious, are adequate for the revision of a work of the scope of Stephen's Commentaries; enlarged as many of the branches of law therein included have now become. The revision of the whole book has therefore "been systematically apportioned amongst experts, each of whom has undertaken to be responsible for a definite share of the text." To mention the names of only a few of these is sufficient to convince our readers that the work has been satisfactorily done. In the first volume a large part of the subject of "Things real" has fallen to Mr. Jenks himself; while the chapters on Deeds, Conveyances, Registration of Title, etc., have been revised by J. A. Strahan. In the second volume perhaps the most important chapter, namely, that on "Title by Contract," has been revised and practically re-written by Mr. J. M. Gover, and the subject of Civil Government by Mr. Graham-Harrison; while Mr. C. A. Montague Barlow is responsible for the treatment of the "Church." As to the third volume the whole of the "Social Economy of the Realm" has been re-arranged, and is mostly revised by Mr. F. W. Hirst, though there are important contributions by Mr. Macmorran and Mr. Stuart Moore. There are added four new chapters on equity by Mr. Strahan; and most of the residue of the volume has been revised by Mr. T. Willes Chitty. The fourth volume is almost entirely given up to "Crimes," under the supervision of Mr. J. A. Simon. The reader will find many expansions of modern and numerous excisions of antiquarian law. We may also call attention with satisfaction to what Mr. Jenks calls his conservative changes, which consist in, wherever possible, restoring Blackstone's original text. The portion of the text taken from Blackstone is included in square brackets, but in one instance at least these have gone astray. We have noticed a few slight slips, such as the omission to chronicle the addition of another Commissioner to the Central Criminal Court; there being no notice of

the necessity to give prisoners in charge to the Jury, and no reference, when treating on the subject of Education in London, to the London Education Act 1903, which was, we presume, contemplated when this book went to press. Apart from the few inevitable slips, the new edition seems to us to worthily maintain and continue the high reputation of this standard work.

Forty-first Edition. *Every Man's Own Lawyer.* London: Crosby, Lockwood & Son, 1904.

We cannot pretend to have done more than glanced at parts of this well-known publication, but we have found the law on many subjects clearly and accurately laid down, and the amount of information contained in the space is wonderful. If judiciously read, it should be of considerable use to laymen, and even lawyers might find its condensations of the law sometimes useful.

CONTEMPORARY FOREIGN LITERATURE.

Principes de Droit International Privé. By A. PILLET, Professeur à la Faculté de Droit à Paris. Paris and Grenoble, 1903.

This large and handsome volume contains a great amount of independent research, as the professor is by no means satisfied with merely recording the views of his predecessors. His principle is inductive, based not on axioms but on observation of facts. Accordingly he rejects as an *a priori* system the English and American theory of comity. The rules of private International law must be an induction* from existing facts, not a deduction from axioms framed by jurists as being intrinsically just. He also objects to Roman law as a basis of principles, for there is no text of the *Corpus Juris* which can be cited as unequivocally laying down a rule of private International law. Bartolus and his successors wrested the text to meet the case of a divided Italy. The professor defines private International law as *la science qui a pour objet la réglementation juridique des rapports internationaux d'ordre privé*. Its objects are (1) to regulate the condition of foreigners in each State, (2) to resolve the conflicts between different legislations, (3) to determine for any State the effects of juridical acts done abroad. He prefers the phrase "conflict of laws" to "private International law," on the

ground that the former has a more extensive connotation, and includes the relations between citizens of federated communities. The book is written in a bright and interesting style, and solves, or attempts to solve, numerous intricate problems.

Bibliographie Générale et Complète des Livres de Droit et de Jurisprudence publiés jusqu'au 7 Novembre, 1902. Paris, 1903.

Though only the catalogue of the well-known publishing house of Marchal and Billard, this is an indispensable guide to the legal works, original and translated, published in French up to the date above mentioned. The list of works on English law fills about a column, of United States law there are only eight, two of which deal with Louisiana. The English begin with Jouffroy, *La Constitution de l'Angleterre* (1843), and end with Leval, *La Nouvelle Loi Anglaise et les Sociétés* (1901). The bibliography of works on *assistance judiciaire* is interesting in view of the English legislation of 1903 in favour of poor prisoners.

Wegweiser für den Rechtsverkehr zwischen Deutschland und den Vereinigten Staaten von Amerika. By Dr. JUR. PAUL C. SCHNITZLER. Berlin, 1903.

The value of such a work as this is shown by its attaining a second edition in a short time. It is a compendium of United States law, chiefly family and commercial, for the use of the lawyers of Germany, and seems very careful and accurate. That there must be a considerable legal connexion between the two countries is proved by the existence of the "German-American Law Association of New York."

Il Sentimento Giuridico. By Dr. GIORGIO DEL VECCHIO. Turin, 1902.

Dr. Vecchio's pamphlet—a reprint of an article in the *Rivista Italiana per le Scienze Giuridiche*—is a commentary on the statement of Aristotle at the beginning of the *Politics* that what distinguishes man from other animals is the sense of justice and injustice. Justice is either innate or conventional; if innate it is, with Herbert Spencer, affected by heredity and association; for the purposes of modern judicial decision it must be to a large extent conventional. The effect of this is that, to use the learned author's concluding

words, the sentiment of justice is the anthropological exigency of right, its primary indication, the psychic expression of its human necessity. What this means we must leave to our readers.

Le Clausole di Concorrenza. By Dr. ADOLFO RAVÀ. Milan: 1903.

"Contracts in restraint of trade" is perhaps the nearest approach to a translation of the title of this small volume. It is a useful summary of what the codes and jurisprudence of the principal Continental countries have effected in this important branch of law. Dr. Ravà justly remarks that the English decisions stand by themselves, owing to the peculiarly English doctrine of consideration. He is himself in favour of liberty of action, that men should make such contracts as they please, subject, of course, to fraud and injury to the State. He recognises that the tendency of modern English decisions is in the same direction.

PERIODICALS.

Deutsche Juristen-Zeitung. 15 October—15 December. Berlin.

The question of legal education seems to be exciting as much attention in Germany as in England. Professor Fischer of Breslau deals with the matter at p. 457, and there are other allusions to the subject in these numbers. Other interesting articles are that on "Parsifal" in America, and copyright questions connected therewith (p. 521), and that on the legal position of the foreigner in English law (p. 560).

La Giustizia Penale. 23 September—2 December. Rome.

The digest of decisions appears as complete as ever, and will be of service to any one who may wish to make himself acquainted with the practical working of a Continental penal code. Note that in spite of codification the text of the *Corpus Juris* is still sometimes of practical use, e.g., the Cassation case of treasure trove on p. 1188, where the usual passages of the Digest and Code are cited. Another case is one before the Court of Appeal at Catania, reported on p. 1500, where it was held that a person present at the reading of a document without objection must be taken to assent to its contents. This was supported by two passages of the Digest.

JAMES WILLIAMS.

WORKS OF REFERENCE.

The Lawyer's Companion and Diary, 1904. Edited by E. LAYMAN, B.A. London: Stevens & Sons.—The fact that this Diary has now reached its fifty-eighth year is a sufficient proof of its usefulness to the Profession. The contents are well arranged, and include Tables of Costs, Stamp Duties, Time-tables of the Courts, and in fact all information likely to be of assistance to lawyers. The lists of Barristers and Solicitors appear to have been carefully revised and brought up to date; and the inclusion of a good index serves to render the work an extremely handy one for reference.

The Lawyer's Remembrancer and Pocket Book, 1904. By ARTHUR POWELL, K.C. London: Butterworth & Co.—The present issue of this handy little work well maintains its usual high standard of excellence. Revision of the contents has been made down to the day of publication: and special articles on the Employers' Liability Act, and the recent cases of Landlord and Tenant, are included in the work.

Sweet & Maxwell's Diary for Lawyers, 1904. Edited by FRANCIS A. STRINGER and J. JOHNSTON.—This Diary is deserving of a place on the table of every solicitor, as the information given is extremely useful, and is well arranged for handy reference. In accordance with the new County Court Rules, the County Courts Time-table and Table of Costs have been brought up to date. A new feature, and one which should be useful to solicitors, is the addition of the market and early closing days in the list of County Court Districts.

Fry's Royal Guide to the London Charities, 1904. Edited by JOHN LANE. London: Chatto & Windus.—To solicitors and all concerned with the distribution of money for charitable purposes, we can heartily recommend this little work. It contains a complete list of the London Charities arranged in alphabetical order, with an index in which the various Institutions appear under the heading of their respective classifications, so that it is possible in a moment to discover the information one may be seeking.

Whitaker's Almanack, 1904. London: Whitaker & Sons.—The value of Whitaker is known to everybody, and the new edition well maintains its reputation as a reliable work of reference. There are very few subjects that are not dealt with in its pages, and for the busy man the book has become indispensable. Among the new features this year are A Political History of the World in 1902-3; a short account of the Marriage Laws of Scotland, and a Tabular History of Consols: while students of the Fiscal Question will find much to interest them in the pages devoted to the British Share of the World's Commerce, Statistics of Trade for half a century, and Food Imports.

Whitaker's Peerage, 1904. London: Whitaker & Sons.—This work is a fitting companion volume to the Almanack, and is in every way up to the usual high standard of excellence of Messrs. Whitaker's publications. In the present issue no departure from the usual form has been attempted, but many minor improvements have been effected, and the contents from beginning to end have received a thorough revision right up to the time of going to press. The work forms a most complete and accurate directory of titled persons.

Books received, reviews of which have been held over owing to pressure on space:—Blackwell's *Law of Meetings*; Williams' *Vendor and Purchaser*; Roberts' *Grant and Validity of British Patents for Inventions*; Sington's *Law of Negligence*; Lewis and Porter's *Law of Motor Cars*; Fitzpatrick and Haydon's *Secretary's Manual of Law of Joint Stock Companies*; *Yearly County Court Practice, 1904*; *English Reports to Vol. 35*; Redman's *Treatise on the Law of Arbitrations and Awards*; *Encyclopædia of Forms and Precedents, Vol. 5.*

Other Publications received:—*East & West* (Bombay); *Copyright in England*; *Copyright in Canada and Newfoundland* (Thorvald Solberg, Washington).

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Review of Reviews*, *Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*, *Japan Register*.

THE LAW MAGAZINE AND REVIEW.

No. CCCXXXII.—MAY, 1904.

I.—THE PRACTICAL WORKING OF THE EDUCATION ACT.

THIS topic is admittedly one of keen sectarian and political discussion. The following lines are written from the standpoint of neither of the parties, but from that of a practical administrator concerned in watching the working of a piece of legal machinery under the strain and stress of daily application. To the thoughtful observer there is an obvious interest, theoretical as well as practical, in observing how far the actual results of a law carry out the intentions of its framers, and how far on the other hand the task of effectual legislation proves in every instance one that passes the wit of man to achieve at a first effort. It may be mentioned at the outset that, in the bitterness of partisan attack, it has often been unfairly forgotten that the Act as drafted was a beautiful piece of legislative craftsmanship, remarkable in its contrast to the verbosity and confused arrangement of the Statutes of the 18th century, though dealing with an administrative problem far more complex than usually had to be dealt with at that period. But this symmetry was to some extent marred by the many changes introduced during the passing of the Bill through the Houses of Parliament; for being a contentious measure was much against its being shaped into an ideal Act.

A variety of the provisions of the Act have aroused controversies which were undreamt of by its framers. The movement curiously misnamed "Passive Resistance" was not expected. The recalcitrancy of a group of County Councils has been an unwelcome development of this agitation. Passive Resistance is illegal even in the case of individuals; and the law will enforce by its sanctions the discharge by each ratepayer of his clear duty of paying his rates. When individuals act in combination, the illegality is intensified, and the liability then incurred becomes actually criminal. It cannot of course be claimed that the legal obligation of a County Council to carry out this Act is either as precise or as easily enforceable as the duty of a ratepayer to pay his rates—yet the County Council's obligation seems undeniably real. So that any combination of county councillors in one locality to give preferential treatment to any particular class of schools—and *à fortiori* a combination in which delegates representing separate County Councils unanimously decide to make the Act inoperative for the same type of school—presents a state of facts which seems clearly to come within the comprehensive and elastic meshes of the law of criminal conspiracy.

In January, the Consultative Committee of the Welsh Councils agreed without a dissentient voice to the following resolution—viz., to advise all the Welsh County Councils in autonomous districts to rigidly maintain their present attitude. This course of action amounts to a deliberate tampering with the law on the part of a body charged with its administration. The Consultative Committee were of opinion that the Board of Education would not dare to apply for a mandamus against the whole of the Welsh County Councils; an impression whose probability is strongly corroborated by the known reluctance of a Government office to make use of this means of enforcing obedience. (The Local Government Board, for example,

has hitherto refrained from insisting on compliance with the law in the matter of chaplains in unions.) If, however, a mandamus were issued in the case of any particular County Council, all the County Councils were to be called upon "*loyally*" to stand by and support any such Council in resisting to the utmost any application for a mandamus. What steps do the Board of Education take? They have *intimated* to the Carmarthenshire Council—that they—*i. e.*, the Board of Education, must now *contemplate* the *need* of an *enquiry* into the complaints of the managers of nine non-provided schools! Such tentative and hesitating action on the part of the central authority is in striking contrast with the curt and illegal pertinacity of a local authority strong in the consciousness of direct popular support. For the Carmarthenshire County Council met this Whitehall letter by a contemptuous resolution, that it be left to lie on the table until the results of the March County Council elections had made known the will of their constituents. It is hard to see what remedy Lord Londonderry has, unless, stimulated by the example of South African impulsiveness, he proceeds with martial fervour—takes his courage in both hands—suspends all the Welsh local education authorities—appoints his own Board of Education for the whole Principality—and takes his chance of an Act of Indemnity before the next general election.

Some of the Welsh County Councils are fought with their own weapons. The Forden Board of Guardians refused to collect the rate levied by the County Council of Montgomery; the reason of the refusal being that the County Council would not make any payment out of the rates to the non-provided schools. All the schools in that union are of this kind. At Pontypridd, a gentleman holding that an education rate in which non-provided schools were to have no share, was levied for an illegal purpose, refused to pay. He was not prosecuted.

The Act by practically endowing the Roman Church with thousands a year has produced an unexpected result in the north of England. Elementary school teachers there, who are members of religious orders, hand over their stipends to their superiors. This money is being utilised to carry on secondary schools. There has been an opposite straining of the Act in Yorkshire. In the West Riding the education authority finding the training of pupil teachers a heavy burden on the funds for secondary schools, has raised the salaries of these teachers by the amounts which have to be expended on their teaching. These salaries by the Act come on the Elementary Education rate. The education of pupil teachers is so costly that in some counties it will absorb the whole of the "whiskey money," and leave nothing for technical education to which that money has hitherto been usually devoted. ●

One aim of the Act was to do away with what was termed the one man management—where the school was practically an appanage of the Parsonage. There is a feeling that the Act has been strained when incumbents have secured the appointment as foundation managers of wives and daughters. In one case the Rector's butler was so commissioned.

An object of the Act was to enable each educational area to fix the manner in which the whole of its education should be co-ordinated. Three hundred and twenty-eight educational areas were created. Sixty of these areas are administrative counties. To make a working legislative unit for this purpose, an area containing an ascertainable population as well as a definite rateable value is needed. A county is very often faulty in each of these respects. Essex, for example, has a large poor working-class London-over-the-border population. So Saffron Walden wants to abandon Essex for Cambridgeshire. And the Essex Education Committee make a public protest that the work of supervising even elementary education is beyond their

powers. The councillors for the most part depend for their livelihood upon their own exertions. *They therefore are not able to give the time needful for administering the educational affairs of their county. Part of their work is the oversight of 440 widely scattered elementary schools. This means such a variety of demands on their time that most of the councillors have to let matters slip through without enquiry. Yet surely to constitute fairly uniform administrative areas was not an impossible task for the legislator.

Take, as an example of the working of the Act, the Cambridgeshire County Council. With a population of only 120,000, from which to draw sufficient persons of leisure to constitute its whole body of aldermen, councillors, and committeemen, the Act bids it deal with all the educational matters that were managed by the School Board for London. This Council began its work under the Act by a circular which put all the voluntary schools in arms. Next came an illegal refusal of a share of the rates to non-provided (formerly voluntary) schools. The Education Committee refused to carry this out. Thirdly came a prohibition to teachers in the matter of non-school work; this, being in violation of the law, had to be withdrawn.

Higher education is, in the eyes of many, of more importance than elementary education, even when supported out of an unlimited rate. Education authorities have responsibilities with respect to each. In county boroughs the rate for higher education has no limit. Two pence is the maximum in administrative counties. Higher education covers a field reaching from evening schools up to (and including) secondary education of any kind. The East Barnet Council, on being reminded in January by the Board of Education of their powers in the matter of higher education, were unanimous in doing nothing for the present. For the buildings needed in higher education, it must be

remembered, an allowance of some £80 a school place has to be made.

By the Act, the duties of school managers are fixed by the hands of local education authorities. The latter, instead of getting at the kernel of education, have mostly concentrated their energies on the shell. All the work of education seems to be highly centralized. For the most part special local educational wants have hardly been talked about. At Diss the managers of the provided schools resigned in a body, as they found they had nothing to do. At Fenny Stratford the managers of the provided schools said that, as a School Board and backed up by the ratepayers, they had spent £20,000 on schools; now they could not spend 50s. for a copper to boil water without going to Aylesbury for permission. So they resigned. At Ampfield in Hampshire, it was demonstrated that a half-penny thimble cost nine-pence before it got on the little girl's finger. Here is red tape gone mad. It reminds one of the Indian official who telegraphed to head-quarters—"Tiger devouring station-master—wire detailed instructions."

The local educational authorities are mutually exclusive, like water-tight compartments. Each, at the cost of the rates, is learning experience. A central department is needed for the exchange of experience, as well as for concentrating educational information. The Leicester Education Committee have—since these lines were written—taken up this idea.

There is a tendency for County Councils to try to cut each other out. A high scale of salaries draws good teachers from the areas of needy Councils—where they are most wanted. But the Act allows a certain amount of grouping of County Councils for higher education. This grouping should be obligatory for matters such as medical school inspection, travelling lecturers (of both sexes) for special local technical training. The areas of the spheres of

influence of the Senior Government Inspectors suggest themselves as the units for such grouping.

The Board of Education wisely make use of their authority to enforce contributions from teachers to a Superannuation Fund. *Mutatis mutandis* the same Board might bring about the insurance of school buildings and furniture on some mutual plan. At present, unless compelled by a trust deed, managers of voluntary schools—as the Board of Education informed the Coseley Education Committee—need not insure. It would seem that the law stops a County Council from insuring schools that are not their property.

The Act did not anticipate the use that appears to be made of school-fees. In the university town of Cambridge the local education authority have agreed to allot a portion of these fees to a school. With this sum a rent will be paid to a nominal owner—that owner being a charitable society whose *raison d'être* is the setting up of Church schools, and the managers being practically identical with this body. Thus the managers get four-sixths of the control as a return for giving the use of the building, and then they do not give it but sell it.

The powers of the Board of Education for interpreting the Act need defining and enlarging. For instance, they ruled a point such as this, that the Act does not confer on members of education committees the right of admission at any time into non-provided schools; yet that this work may be delegated to selected persons duly authorised. Points about the ownership of schools closed by the county Councils are arising. One very unexpected result of this will be to bring into operation a clause in the School Sites Act [4 & 5 Vict., c. 38, s. 2] whose very existence had probably fallen into oblivion. In many parts of the country schools with an attendance averaging about 25 are being closed by the County Councils, and the children are being taken in conveyances to other schools. In such cases the

Act entitles the donor of the site to put in a claim to the school buildings in utter disregard, apparently, of the equally valid claim of the persons who erected them. In the frequent absence of trust deeds, on the other hand, unanticipated claims to the ownership of school sites are being enforced.

What is known as the "fair wear and tear" clause has brought out points for decision. In the Act generally we have the comprehensive term "school-house," meaning everything except the teacher's house. In the clause in question the words are, such damage as the local authority consider to be due to fair wear and tear "in the use of *any room in the school-house.*" Under the current interpretation of this clause, it has been ruled—though not as yet officially—that the managers are responsible for any damage done to the buildings from *outside*, e.g., windows broken by children at play in the school-yard. Litigation may arise—there is a case—from a dispute between the managers and the local authority, as to whether a window was broken from the inside or outside. The caretaker had not observed where the glass had been broken when it was cleared away. Under this clause, who is responsible for the cloak-room, for the offices, for emptying cesspools, for the repairs of playgrounds?

The main hindrance to the due carrying out of the Act is the cost. In December 1903, the Worcestershire County Council unanimously decided that all national elementary education should be an imperial charge—because the incidence of education fell unduly heavily on the cultivators of the land, as rural parishes were educating children for the benefit of other industries. In some rural parishes, they stated, the increased cost of education under the new Act is more than fourfold what it has been, because the Education Rate raised in the parish goes towards the cost of improving, not only its own education, but also that of all the parishes in the county.

All the above-mentioned points come within the scope of the Act. Nothing has been said here of those difficulties in our system of education of which the framers of the Act were fully cognisant, but with which they deliberately abstained from grappling. Such, for example, is the grievance so seriously felt in the 8,000 single school parishes. The law makes children within certain age limits attend these schools, while the management of these schools is by the Act practically confined to one section of the Christian Church.

I have now pointed out a number of questions on which much time and money and vexation of spirit is being lavished, because they were not foreseen by the Legislature when the Education Act was passed. No attempt at predicting a solution is made. But there can be no doubt that in effecting any solution the Education Act itself will have to undergo many changes. Its warmest supporters have come to look at it as by no means a final enactment. Yet, on the other hand, its bitterest critics will perhaps not refuse to confess that it has achieved two results which cannot fail to be permanent. Its unification of management has placed in the hands of the County Councils a power which they are never likely to consent to transfer to any other body, whether existing or to be created. And far beyond this result is the vague but far-reaching effect which the Act has produced in arousing in every portion of the kingdom, and in every class of its inhabitants, an interest in the problems of popular teaching, and an active zeal in the extension of education, such as cannot fail to secure a great intellectual advance in the mental level of the masses of the people, and therefore in the economical prosperity and the political stability of the country and consequently of the empire.

H. W. P. STEVENS.

II.—THE RIGHT OF THE SUBJECT TO PERSONAL LIBERTY IN ENGLISH LAW.

(Continued from page 208.)

SHORTLY afterwards Charles is found breaking his plighted word. Quarrelling with the Petition of Right Parliament, Charles dissolved it the next year, and imprisoned several of its most patriotic members, its "vipers," as he called them. One of these, Sir John Eliot—an Englishman who deserves a place in the long roll of martyrs in the cause of liberty,—died in prison after a confinement of nearly four years. From the dissolution of Parliament, Charles ruled the country despotically for eleven years. All manners of hateful methods of governments were now revived. "Imposts fallen into desuetude, monopolies abandoned by Elizabeth, royal forests extended beyond the limits they had in feudal times, fines past endurance, confiscations without end, imprisonments, tortures, and executions all mark these years."¹

Matters came to a head between Charles and Parliament when he attempted to seize the "Five Members." At last Parliament took timely occasion to openly defy him. Dismayed, humbled, and bewildered, the king now began "to feel," as Clarendon says, "the trouble and agony which usually attend generous minds upon having committed errors," or, as Macaulay puts it, "the despicable repentance which attends the bungling villain who having attempted to commit a crime finds that he has only committed a folly."

With much of the troublous history of our country during the twenty years that now followed, our subject has no direct concern. This is all the more true, inasmuch as the Rescissory Act of 1661 repealed the *letter* of all the legislation effected during the preceding twenty years. But the

¹ Lord: *Modern Europe*, p. 127.

spirit of that legislation has since been replaced in and now permeates our constitution under happier auspices. Despite its many illegalities, the doings of the Long Parliament deserve to be enshrined in the memories of Englishmen. Its sweeping Acts were in such entire accord with the public feeling of the nation, that even the Rescissory Act failed to bring about the recrudescence of many of the constitutional sores which it abolished. The Court of Star Chamber was not reconstituted. The Triennial Act was only partially robbed of its effect. And the attempt of 1641 to make the writ of *habeas corpus* more effective assisted to bring about the Habeas Corpus Act of 1679. The abolition of the Star Chamber not only removed an engine of despotism which had been extensively used as the means of effecting direct oppression over individual subjects, but also removed the channel by way of which the Crown usually coerced the judges and juries of the Common law Courts to interpret the law in accordance with royal desires. Refractory judges were dismissed, and contumacious juries were fined, as occurred in *Sir Nicholas Throckmorton's Case*.¹ But while the abolition of the Star Chamber was a step forward in the evolution of our judiciary towards separation from, and independence of, the Executive, the abolition of this channel of maladministration had temporarily a bad effect on the Common-law Courts. Royal interference with them was now much increased. The Bench was packed with royal nominees, and juries were more bullied than ever.

After the Restoration, despotism gave much of its capricious attention to inventing those odious limitations on religious liberty known as the "Clarendon Code." Indirectly this code gave rise to a case which established the immunity of our much-harassed juries. This was *Bushell's Case*, tried in 1670.² Bushell had been committed to prison as one of a jury which had brought in a verdict contrary to

¹ 1 *State Trials*, 869.

² 6 *Ibid.*, 899.

the direction of the judge. He sued out a writ of *habeas corpus*. It was stated on the return to the writ that Bushell had been committed for finding a verdict "against full and manifest evidence, and against the direction of the judge." Chief Justice Vaughan cast ridicule upon this return, and gave judgment in favour of Bushell. The whole effect of this case was to establish the right of the jury to bring in any verdict it pleased with absolute impunity, while acting *bonâ fide*. What weakened the immediate effect of this fortunate judgment was the practice, which now increased, of packing juries; this was especially noticeable in "trials for high treason," as mentioned in section 9 of the Declaration of Rights.

The Habeas Corpus Act was passed in 1678. It is deservedly the most famous enactment of the Stuart era—the era of good laws but bad government, as it is frequently termed. This Act provided the most efficient security for personal liberty that the joint ingenuity of lawyers and statesmen has ever devised. This it effected by ensuring that the old Common law writ of *habeas corpus* should be granted to every person as a "matter of right." And it further ensured that, once granted, it would be in effect speedier and more sure-footed than the old procedure had been.

The Habeas Corpus Act was, first and last, an Act for improving the procedure pursuable to obtain the old Common law writ of *habeas corpus* and its corollary of a speedy trial. It introduced no new principle into our jurisprudence, but in a simple business-like way it transformed a procedure that was faulty into a procedure that was almost perfect. It made of certain effect a writ that was before of uncertain effect. The very essence of the Habeas Corpus Act is that it ensures a speedy trial for every prisoner detained on a *criminal* charge. Unfortunately it did not operate against other cases of illegal detention, such as those on the pretext of lunacy. This omission was remedied by the Habeas Corpus Act 1816.

In spite of the public-spirited efforts which procured us the Habeas Corpus Act 1678, we find during the next few years all manner of abuses again creeping into the government of the country. Charles II rules for the last three years of his reign without a Parliament. The Bench is packed with such creatures as the notorious Jeffreys. Sheriffs are coerced to exercise a keen discrimination in their selection of jurymen. The Court of High Commission is revived by James II under a new name. The dispensing and suspending power of the Crown is unconstitutionally exercised. The law of treason is strained in the cases of Russell and Sidney among many others. But the spirit of the nation again exhibits itself equal to the occasion. A "Model Revolution" is effected. Royal tyranny is once more followed by a wise and comprehensive enactment favourable to the liberties of the subject. The Bill of Rights—one of those "books" which make up what Chatham called the "Bible of the British Constitution"—is passed. This Act declared the general principles of English liberty as fully as the Act of Habeas Corpus secured one particular phase of it. The Stuart dynasty now become exiles and rebels. Present day Englishmen can be thankful to the Stuarts for showing their forefathers where despotism could more or less legally indulge its arbitrary inclinations. These flaws being seasonably repaired, after generations have enjoyed the silver lining to the clouds which lowered upon the national landscape in the seventeenth century:

The Independence of the Judges.—Early in the eighteenth century the cause of personal liberty received one most essential and valuable accession of strength. The corrupt *personnel* of the bench during the Stuart period—with some notable exceptions who were usually displaced—was evident to all observers. Owing, possibly, to the corrupt constitution of the judiciary at the moment, the independence of the Bench was not secured by the comprehensive Bill of

Rights. This was effected by the second Act of Settlement, which in one of its clauses stipulated that the commission of the judges should be irrevocable "*quamdiu se bene gesserint.*" The removal of a judge can now only be effected on the joint address of the Houses of Parliament. The complete severance of the noxious connection between the judges and the Crown took place in 1760, when an Act was passed to continue the judges in their office notwithstanding the demise of the Crown. Henceforward the judges have been independent of the Royal pleasure. "There is no liberty," says Montesquieu, "if the judicial power be not separated from the Legislative and Executive."

Moreover, the Bar of this country now began to develop a boldness and a pertinacity to which it had hitherto been a stranger. It is to be trusted that the advocates of this country will never lose their reputation for fearlessness. However obnoxious the criminal, however detestable the crime charged against him, he has a right to a fair trial. As Mr. Gladstone once said in Middle Temple Hall: "Those whose lot it is, however unworthy, to be charged with the special responsibilities of government, the longer they live and the larger their experience grows, the more deeply do they become convinced of the inestimable value and the indispensable necessity of a free and fearless Bar, in order to secure and sustain the liberties of the country."

Among other events which occurred during the reigns of William and Anne favourable to the cause of liberty may be mentioned the following:—The abolition of the censorship of the press, which Macaulay says "has done more for liberty and civilisation than the Great Charter or the Bill of Rights"; the material amendments which were now brought about with regard to the law of Treason. The accused was allowed to defend by counsel, and to have his witnesses examined on oath; the title to the Crown becomes a Parliamentary one; the present dynasty traces

its title to the Act of Settlement; the position of the army is carefully regulated by, and made subordinate to, Parliament.

The House of Hanover.—During the first fifty years after the accession of the Guelph dynasty there is little of a tangible nature to record in the progress of the *legal* right to personal liberty. It is only the connection that exists between our personal liberty and our system of Parliamentary government, with its far-reaching results, that makes this period material to our subject. Party government now develops. The Septennial Act is passed in 1716. "The centre of gravity of the State is moved to the House of Commons." The principles of liberty were allowed to make their home in England under the mild sway of the first two Georges.

But George III had before he came to the throne "made up his mind that he should rule his ministers, not his ministers him." We are told that his imperious mother thus advised him—"When you come to the throne, George, *be king.*" With great assiduity and much bribery the young king began to build up a new political party favourable to the Crown. Through this party, the "King's Friends," as they were styled, the monarch hoped some day to be supreme in Parliament, by much the same exercise of royal influence as Henry VIII had before him resorted to. But times had changed. The loss of the American colonies under Lord North's ministry discredited the party which truckled to the royal pleasure. And in 1780 Dunning moved his celebrated resolution in the House, "that the influence of the Crown had increased, was increasing, and ought to be diminished."

It has been well said that "one of the conditions necessary for the maintenance of that species of freedom which excludes all arbitrary power, is, that the people should be ready to take part with the weak oppressed, against the powerful oppressor. They must have a keen sense of justice. The

people ought to feel a continued jealousy of power, and when they see any man borne down unjustly, they ought to perceive immediately that the cause of that man is the cause of the whole nation. "This," said Lord Russell, "is the case with the English people."

The causes of Darnel, of Hampden, of Jenkes, and of Wilkes, have indeed been the causes of the whole nation. "Liberty Wilkes" was in many respects an unsavoury champion of freedom. But he was, to some degree, redeemed by his indomitable courage, his energy, and his able opposition to all phases of tyranny. Wielding a trenchant pen he vigorously attacked the government. In the celebrated "No. 45" of the *North Briton*, he, among other remarks, accused the king of uttering a lie upon the throne. For this he and his papers were arrested under "general warrants." These warrants were issued not against John Wilkes by name, but against the authors, printers, and publishers of "No. 45" of the *North Briton*. His case was tried before Lord Mansfield. Pleading the illegality of his arrest under a general warrant, which he termed "a ridiculous warrant against the whole English nation," Wilkes was acquitted. The decision of the great Chief Justice was that "a general warrant is no warrant because it names no one." And so this dangerous and arbitrary form of arrest—a belated remnant of ancient tyranny totally subversive of the liberty of the subject—was declared illegal.

Lord Chatham spoke with abhorrence of Wilkes and of his works, but with indignation of the means that had been used to oppress him. In the cry of "Wilkes and Liberty," the country adopted a contemptible person for the sake of a sacred principle.

Wilkes and his companions at length obtained exemplary damages against the ministers who had authorized the issue of the general warrants. If the independence of the judges

and the immunity of juries had not previously been secured, it is very probable that the cases turning on the legality of "general warrants" would have been decided, if not in favour of the Executive, at least in a way less distinctly assertive of the liberty of the subject.

After the decisions in the cases connected with Wilkes' name, nearly all the old methods and means of arbitrary imprisonment became impracticable and impossible. Since this time the attention of those attached to the cause of liberty has been directed towards improving the *substantive* law affecting it; towards emancipating negro slaves; towards reducing the number of capital offences; towards improving the position of those imprisoned for debt; towards amending our criminal law; and latterly towards ameliorating the pitiful lot of the poorer and more helpless classes, so that they might be, in some degree, *free to enjoy their freedom*.

Villeinage and Slavery.—Early in the reign of George III, there arose cases which drew much attention to the *status* of negro slaves in this country. The history of the various forms of servitude prevalent at different periods in our history is rather obscure. One of the many effects of the Conquest was to improve the condition of the Saxon *theows*. Until the Norman period the lot of this class was practically the lot of slavery, but hereafter the Normans, by totally disregarding the degrees of English dependence, raised the *theows* to a common level with the general body of *villeins*. During the middle ages villeinage gradually fell into desuetude, but was not finally and legally abolished until the decision in the aforementioned case of *Pigg v. Caley*.¹ Traffic in English slaves in England was at an early date discountenanced by the Church. Owing chiefly to the benign influence of the Church, slavery as an institution gradually became obsolete in English law, though it was never abolished

¹ *Noy Reports*, p. 27.

by any statute. In fact, the decision in the case of the negro *Somerset*¹ was grounded more on public policy than on express enactment. The essence of Lord Mansfield's famous judgment in *Somerset's Case* is, "that the state of slavery is so odious that nothing can be suffered to support it but positive law; this state of slavery is neither allowed nor approved by the law of England, and therefore the black must be discharged." A few years prior to this, 1762, it had been held in the case of *Shanley v. Harvey*, "that as soon as a man sets foot on English soil he is free, and that he may have a *habeas corpus* if restrained of his liberty by his master." It must be noticed that these judgments only referred to cases where negro slaves were brought to England by their masters, and therefore claimed their freedom as *Somerset* and *Harvey* had done; if they omitted to establish their freedom, upon returning voluntarily to a country where slavery was legal, they reverted to their former condition of slavery. Their stay in England only put their liberty, as it were, into "a sort of parenthesis."

Slavery was for a long time after these judgments a recognised institution in our colonies. Even in enlightened Scotland slavery was still in vogue, and it was not until 1799 that slaves of Scotch blood employed in the "salteries" were emancipated.

Owing to the advocacy of Wilberforce, Sharpe, Clarkson, Fowell, and others, slavery was abolished in our colonies in 1833. Since this date the constitutional rights of all English *freemen* and the constitutional rights of all English *subjects* have been almost identical. As Hallam has observed in a much quoted sentence: "the law has never taken notice of gentlemen." And on the other hand we find Mr. Justice Powell affirming "that the law takes no notice of negroes." Thus it is found that in our Empire the scales of justice are held impartially between the *quondam* slave and the

¹ 30 *State Trials*, p. 1.

descendant of a hundred privileged ancestors. The doctrine of "equality before the law" now began to enter the domain of practical application, and by its advent the lower classes in our social scale are relieved of one of those great heart-burning causes of discontent and revolution which exist in those communities where there is no such equality.

Personal responsibility of Ministers.—One of the great factors in the development of individual freedom during the last two centuries has been the fact that our Courts have steadfastly refused to recognise that executive officers should be exempted from the responsibilities consequent upon the illegal exercise of their official power.¹ The names of Coke, Camden, Mansfield, and Denman, readily occur to us in connection with the judicial assertion of what Professor Dicey terms "the equal subjection of all classes to the ordinary law of the land administered by the ordinary tribunals." A French writer, in noticing the absence in this country of the familiar "*droit administratif*" and "*tribunaux administratifs*," which are assumed to be essential to the good government of our neighbours across the channel, says that "this absence of arbitrary power on the part of the Crown, of the Executive, and of every other authority in England, has always seemed a striking feature, we might almost say the essential characteristic, of the English constitution."

Contemporaneous with the movement made towards abolishing slavery in our colonies, was the movement towards reforming our stringent laws regarding imprisoned debtors. "Our law of debtor and creditor," says Erskine May, "until a comparatively recent period, was a scandal to a civilised country." From 1812 to 1859 the Legislature recognised in various ways the just distinction between misfortune and crime. Since the latter date it is law that "a person shall not be arrested upon *mesne* process in any action."²

¹ Dicey : *Law of the Constitution*, p. 210.

² 32 & 33 Vict., c. 62, s. 6.

The practice of espionage still so much in vogue in some countries, but which is so alien to our present customs and breeding, has now fallen into desuetude, the only legal vestige of it being the right of the Postmaster-General to open letters, a right seldom, if ever, exercised. The last instance, possibly, occurred in 1844, when Sir James Graham was accused of opening the letters of a certain notorious foreigner. Readily admitting the fact, he pleaded clear statutory authority for his action: this defence was endorsed, after full inquiry by an independent Committee of both Houses, somewhat to the public surprise.

At the beginning of the last century our statute books were blotted with the penalty of death for upwards of two hundred offences. Among the crimes so punishable we find the trivial offences of cutting down a growing tree; being found with the face blackened upon the high road; and being in company with the persons called gipsies.¹ The number of capital convictions in 1832 was 1,449. Owing mainly to the initiative of Lord Brougham, this terrible figure was reduced to 29 in 1862 by means of various reforms in our criminal jurisprudence.

With but three exceptions all possible ways of legal but arbitrary arrest or restraint have now for some time been abolished in our country. These three exceptions occur in cases of contempt of Court; contempt of Parliament; and impressment for the Navy, which is still lawful. A person deprived of his personal liberty in one of these ways has practically *no appeal* against the exercise of such arbitrary power, however unjustifiably it may be exercised in his particular case. Much might be said in favour of abolishing these remnants of ancient tyranny.

The growth of that *compromise* which has happily been arrived at in our laws, between the right of the *individual* to personal liberty, and the right of the *community* to prevent

¹ Russell : *English Government*, p. 140.

the abuse of that right, has now been to some extent traced. The endeavour has been made to show—How the manifold enemies which have retarded the progress of liberty in other countries were in this land boldly grappled with and overcome. How successive and successful rebellions were the illegitimate causes of legitimate charters and laws. How the “base laws of servitude” and villeinage gradually fell into an unlamented desuetude, and were succeeded by our contractual law of master and servant. How the abstract principles of freedom recognised by Magna Charta were at last transformed into enforceable actualities by the Habeas Corpus Acts. How every harsh exercise of the Royal power was almost invariably followed, sooner or later, by a suitable limitation of that same power. How a servile bench was transformed into an independent judiciary. How juries came to be packed and intimidated but were again revived as bulwarks of justice. How, curiously enough, the greatest possible freedom of the individual has been found compatible with, possibly causative of, a degree of obedience to law and order such as hitherto has never been recorded in the annals of any other people. How, in fine, our freedom has “slowly broadened down from precedent to precedent.” Auspicious as is the retrospective history of our race in its connection with the principle of personal liberty, no less hopeful is the future outlook, for throughout the Empire of the “White Man’s Burden” our “Daughter-lands” have one and all nailed it to the centre-poles of their constitutions. But bearing in mind that empires decay, while their history lives after them as a storehouse of precedent for the empires of coming æons, it is, possibly, a still better omen for the future welfare of the human species in general, that this principle is already recognised as a fundamental adjunct to every successful imitation of the immortal British Constitution.

S. P. J. MERLIN.

III.—COMPULSORY PILOTAGE IN THE LONDON DISTRICT.

IN the *Cayo Bonito* case,¹ Mr. Justice Barnes referred to “the present unsatisfactory state of the legislation which affects the question of pilotage and the exemptions from pilotage in the Thames and its estuary.”

The complications of that law have been commented upon, not only by the Courts, but also by the various Committees which have been appointed from time to time to consider questions relating to Thames navigation, and it may not be out of place to describe the present state of affairs.

The governing statute is, of course, the Merchant Shipping Act, 1894, which (so far as questions relating to compulsory pilotage are concerned) re-enacts the provisions of the Act of 1854. Pilotage is the special subject of Part X of the Act of 1894, and the following are the material sections.

Those which relate specially to the London districts and the Trinity House output districts, are:—

622.—(1) Subject to any alterations to be made by the Trinity House, and to the exemptions under this Part of this Act, pilotage shall be compulsory within the London district, and the Trinity House output districts.

This is followed later on by the following exemptions:—

625.—The following ships, when not carrying passengers, shall, without prejudice to any general exemption under this Part of this Act, be exempted from compulsory pilotage in the London district, and in the Trinity House output districts; (that is to say,)

- (1) Ships employed in the coasting trade of the United Kingdom :
- (2) Ships of not more than sixty tons burden :
- (3) Ships trading from any port in Great Britain within the London district or any of the Trinity House output districts to the port of Brest in France, or any port in Europe north and east of Brest, or to the Channel Islands or Isle of Man :
- (4) Ships trading from the port of Brest, or any port in Europe north and east of Brest, or from the Channel Islands or Isle of Man to any port in Great Britain within the said London or Trinity House output district :
- (5) Ships navigating within the limits of the port to which they belong.

¹ [1902], P. 216, at p. 218.

Turning to the general provisions of the Act, the following section requires ships carrying passengers between places in the British Islands to employ a compulsory pilot, unless the master or mate holds a pilotage certificate :—

604.—(1) The master of every ship carrying passengers between any place in the British Islands, and any other place so situate, shall, while navigating within the limits of any district for which pilots are licensed under this or any other Act, employ a qualified pilot, unless he or the mate of his ship holds a pilotage certificate or a certificate granted under this section applying to the district, and, if he fails to do so, shall for each offence be liable to a fine not exceeding one hundred pounds.

This is followed by a section designed to exempt from compulsory pilotage ships passing through a pilotage district :—

605.—(1) The master and owner of any ship passing through any pilotage district in the United Kingdom on a voyage between two places both situate out of that district, shall be exempted from any obligation to employ a pilot in that district or to pay pilotage rates when not employing a pilot within that district.

(2) The exemption under this section shall not apply to ships loading or discharging at any place situate within the district or at any place situate above the district on the same river or its tributaries.

These sections are preceded by one which is very important, but which is here mentioned last, because it involves the study of several matters outside the Act :—

603.—(1) Subject to any alteration to be made by the Board of Trade or by any pilotage authority in pursuance of the powers hereinbefore contained, the employment of pilots shall continue to be compulsory in all districts where it was compulsory immediately before the commencement of this Act, but all exemptions from that compulsory pilotage shall continue to be in force.

So far as the London district is concerned, the first part of this section, in view of sect. 622, is superfluous; but the latter part, continuing the previous exemptions, is of great importance.

One exemption thus continued is that of ships navigating in ballast between places in the United Kingdom, when not carrying passengers, under the Order in Council of the 25th July, 1861 :—

"All ships navigating in ballast from any port or place in the United Kingdom to any other port or place in the United Kingdom shall, when not carrying passengers, be exempt from compulsory pilotage within the pilotage jurisdiction of the said Trinity House."

The effect of the section is also to continue the exemptions of the (repealed) Pilotage Act, 1825 (6 Geo. IV, c. 125), which had been similarly continued by the Act of 1854. The important section of that Act, so far as the exemptions are concerned, is:—

59.—Notwithstanding anything in this Act contained, the master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British registers, and coming up either (*sic*) by the North Channel, but not otherwise), or of any Irish trader using the navigation of the Rivers Thames and Medway . . . shall and may lawfully, and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel.

This was supplemented by an Order in Council of the 18th February, 1854, designed mainly to put the South Channels on the same footing as the North Channel, and providing as follows:—

"The masters of the under-mentioned ships and vessels shall, subject to the provision contained in the 59th section of the Act of Parliament, 6 Geo. IV, c. 125, in respect of the employment of unlicensed persons, be exempted from compulsory pilotage, viz. :—

"Of ships and vessels trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, when coming up the South Channels :

"Of ships and vessels trading to ports between Boulogne (inclusive) and the Baltic on their outward passages, and when coming up by the South Passages."

The exemptions of this Order in Council, which were continued by the Act of 1854, are continued in the same way by sect. 603 of the present Act above quoted. In quoting the 59th section and the above Order, certain other exemptions have been omitted, which are covered by the

provisions above quoted, these omissions being indicated in the usual way.

Sufficient as the resulting confusion appeared to be, it was yet to be worse confounded. The exemptions of the last-mentioned section and Order in Council were held to apply only to British ships (see *The Hanna*, 1 A. & E. 283; *The Vesta*, 7 P. D. 240). Thus British ships were placed in what was, from one point of view, a more favourable position than foreign ships. In this, Sweden and Norway considered that they had a grievance, and the result of their representations was the passing of the Merchant Shipping (Exemption from Pilotage) Act, 1897, which contains the following provision :—

1. —As from the first day of July one thousand eight hundred and ninety-eight, section six hundred and three of the Merchant Shipping Act, 1894, so far as it continues the exemptions granted by section fifty-nine of the Act passed in the sixth year of King George the Fourth, chapter one hundred and twenty-five, and extended by the Order in Council of the eighteenth of February one thousand eight hundred and fifty-four, and the said Order in Council, shall cease to operate in the case of vessels on voyages between any port in Sweden or Norway and the port of London.

So the complications are made worse by having exceptions to exemptions.

The way to simplification lies through reform, and the question naturally arises whether the system of compulsory pilotage, with its corollary that the shipowner is exempt from liability for loss or damage occasioned to third parties by the fault or incapacity of the compulsory pilot, is a sound one. There is good reason to believe that it is not. The objections to it have been ably summarized in the reports of several Committees, of which the first was the Select Committee of the House of Commons on the Pilotage Bill 1870. In their report the subject is dealt with thus :—

“The objections to the practice of compelling ships to employ pilots are as follows :—

“1. It is unjust, for it obliges many ships that do not require pilots, to pay for keeping up a staff for those who do.

"2. The system tends to create and maintain a body of protected monopolists, whose interests are not identical with those of the shipowner, who know that they must be employed, and whose independent services are probably not so readily or so effectively given as if their employment depended on their efficiency.

"3. A further and very serious objection is to be found in the consequence as regards liability, which has been so fully stated above.

"The liability of the owner and his servants is to put an end to, and the security against mismanagement arising from this liability is seriously diminished, whilst persons sustaining damage by collision are deprived of their remedy.

"4. The captain and his officers, from their acquaintance with their ship and crew, are better able to handle her, even in pilotage waters, than a pilot to whom the vessel is strange. To compel the former to give up charge to the latter leads to disaster.

"The two last objections are fully admitted by most of the advocates of compulsory pilotage. And some of them, whilst advocating the retention of compulsory pilotage, still propose that the pilot shall not be allowed to interfere with, but shall only advise the captain; and that the shipowner shall be liable for the acts of the pilot.

"It is obvious, however, that any attempt to carry this proposal into effect would be met by very serious opposition from the great body of shipowners. The legal principles on which the present law is founded, viz., that a man is liable for the acts of those whom he voluntarily employs, but not for the acts of those whom he is compelled to employ, appears to your Committee to be in itself just and reasonable. And if, for the sake of remedying a practical inconvenience, this principle is departed from, it is probable that further anomalies and inconveniences will be the result. Nor is it likely that the captain and the pilot will ever assume their proper relative positions so long as the former is compelled to employ the latter.

"Your Committee are therefore of opinion that the immunity from liability must stand or fall with the legal obligation to employ a pilot."

The Thames Traffic Committee appointed by the Board of Trade in 1878, also recommended the abolition of compulsory pilotage in the River Thames above Gravesend. They observed that "the law of compulsory pilotage in the River Thames is subject to so many exceptions that it is not easy to state clearly what it is." After a consideration of the subject in various aspects, their report goes on to say:—

"If a vessel navigated by a pilot, but commanded by a master who has passed his pilotage examination, does damage, the owner is responsible. If a vessel navigated by a pilot whom, for any other reason, the owner is not obliged to employ, does damage, the owner is responsible. But if the vessel is navigated by a pilot whom the law requires him to employ, then, whether the owner would or would not for his own sake have employed the pilot, he is free from responsibility,

and there is, practically, no remedy whatever for the injured party. The consequences, when followed out, are most absurd and most injurious. The following are some of the practical absurdities and inconveniences of this state of the law :—

“The whole class of smaller vessels which frequent our ports, and which never need a pilot, are deprived of all remedy when in collision with a ship which is compelled by law to employ a pilot.

“The Admiralty Court is occupied with collision cases in which the question is, not which of two ships was in the wrong, and how much she ought to pay, but whether the one ship or the other, or both, was in charge of a compulsory pilot, and whether that pilot was or was not in actual charge at the time, and committed the fault which caused the collision. This last question is one upon which it is most difficult to get at the truth.

“Two ships, A and B, both of the same size and description, come into London, A from the North Sea, B from the Channel. Both employ a pilot. They get into collision. If A is in fault, B has a remedy ; if B is in fault, A has none.

“Two ships, A and B, say from Leith to London, both take a pilot at Orfordness. A has passengers ; B has none. They get into collision. If A is in fault, B has no remedy against A ; if B is in fault, A has a remedy against B.

“Two ships again, A and B, bound from Havre to London, take pilots at Dungeness. The master of A has taken pains to pass a pilotage examination, and he has a pilotage certificate. The master of B has, perhaps purposely, avoided doing so. They come into collision. A has no remedy against B, whilst B has a remedy against A.”

In 1888 the Select Committee of the House of Commons on Pilotage reported as follows :—

“The question of the continuance or the abolition of compulsory pilotage is one which your Committee have had before them from the commencement of their inquiry. The evidence on this subject has been of a conflicting nature, but your Committee do not feel justified, looking to the vast interests involved, in recommending that there should be any interference with the system as it now stands.

“They are of opinion, taking all the circumstances into consideration, and having regard to the advantages of decentralisation, that the principle of compulsion as it now exists should not be interfered with, leaving to local pilotage authorities full and ample powers to adopt such systems and to frame such regulations, subject to the sanction of Parliament, as may be most conducive to the interests of the trade and shipping of the particular port over which their jurisdiction extends.

“Your Committee are strongly of opinion, having regard to the views just expressed, that the time has arrived when the exemption of the owner from liability for damage done by his ship, when the ship is placed in charge of a pilot by compulsion of law, should cease to exist. Your Committee are of opinion that such exemption is indefensible, and is inimical to the safety of life and property at sea. In their opinion, the master of a vessel, even while a pilot is still on board, should continue to be responsible for the conduct and navigation of his ship.

The subject also received some attention from the Royal Commission on the Port of London, of which the report was issued in 1902. After some observations on the previous reports above quoted, and on the general tendency towards the repeal of the compulsory element in pilotage, the Commissioners mention (in paragraph 100) that the Deputy Master of the Trinity House had stated before them in evidence that the Elder Brethren

"have always been of opinion that passengers need 'legislative protection,' but that they would refrain from opposing the abolition of compulsory pilotage provided that the necessary safeguards for navigation towards the Port and a proper provision for existing interests 'are secured.'"

While in paragraph 325 they say:—

"The exemption of ships subject to compulsory pilotage from liability for damages presses with peculiar hardship on the barge-owners who are a large and important class in the Port of London. We do not think, however, that it is within the scope of our reference to make any recommendation as to the connection between compulsory pilotage and immunity of a shipowner for damage, which concerns general law. It will be competent for the Port Authority, if they should think it to be consistent with public safety, to apply to the Board of Trade for a Provisional Order, under section 578 of the Merchant Shipping Act, 1894, exempting all ships in the Port of London from compulsory pilotage, and annexing to such exemption any terms and conditions which may be desirable."

As instances where the local authorities have acted under this section (besides those under the corresponding section of the earlier Act which is here re-enacted), may be mentioned the Provisional Orders which are embodied in the Rosslare Pilotage Order Confirmation Act, 1897, the Llanelly and Burry Pilotage Order Confirmation Act, 1899, and the Newcastle-upon-Tyne Trinity House Pilotage Order Confirmation Act, 1902. London should follow along the same lines. The general abolition of compulsory pilotage and of the non-liability which it involves, coupled with the general recognition of the principle which makes the shipowner liable for damage done by his ship in consequence of the neglect or default of those in his employ, would have a wholesome effect in promoting careful navigation, and would prove of considerable advantage to the Port of London.

J. DUNDAS WHITE.

IV.—LEGAL EDUCATION* IN ITALY.

THE study of the law in Italy enjoys a following larger by far than that of any other branch of the liberal professions. Nevertheless, the actual number of practising lawyers is, comparatively speaking, small; the explanation of this apparently paradoxical proposition lying in the fact that, whereas a great number of students embark on an elementary course of legal studies, few care to persevere in them after having taken their *Laurea*, or first degree.

This is obtained after a course of four years at one of the Universities. A comprehensive knowledge of the laws of the country has always been held by the upper classes in Italy to be the correct complement of a polite education, while the possession of the coveted title of *Doctor Juris*, by which the baccalaureate is designated, is a useful and often an indispensable qualification for admission to either the Civil or Municipal Service. It is, moreover, considered a necessary equipment towards a number of other professions, among which politics and journalism take the foremost rank.

In order to be admitted as an undergraduate, a candidate is required to have passed certain preliminary examinations at a Public (Government) School. At the offset it may be observed, that, contrary to the principle adhered to in most other countries, a classical education is not necessary.

The *Lex Casati* of November 1859, originally passed by the Piedmontese Parliament for the Kingdom of Sardinia and Lombardy, still governs the entire matter of Public Education in Italy, only slightly modified by subsequent ministerial decrees and royal rescripts. According to the provisions of this law candidates must have qualified at either of these two schools:

- (1) The *Ginnasio-Liceo*, a classical school where, during eight years, students are grounded in Latin,

Greek, Italian, History, Geography, Mathematics, Natural History, Physics, and Philosophy, with yearly examinations, both written and *viva voce*. The education provided at these schools is an excellent one, and the only criticism that has of late been levelled at them is that perhaps undue preponderance is given to the study of Latin and Greek, which take up eight and five years respectively.

- (2) The *Istituto Tecnico*, or Science School, a purely modern institution, where the teaching of the dead languages has been superseded by French, German, and English. Great stress is laid on Mathematics and Book-keeping, and a rudimentary knowledge of Italian Civil and Commercial law is also imparted.

In addition to candidates coming from these schools, an exception of special importance to foreigners is made in favour of students hailing from other than Italian universities.

"Examinations that have taken place out of the kingdom shall be of no effect within the State except in the case of a special law. Nevertheless, whosoever has taken a bachelor's degree in one of the best-known foreign universities, and is able to prove to have pursued the studies required in order to obtain the corresponding degree at an Italian university, and to have passed his examinations therein, shall be exempted from the obligation of undergoing special examinations in these subjects, and shall forthwith be admitted to the general examinations required for the degree to which he aspires."

The student in possession of either of these qualifications has the *embarras du choix* of a great number of universities ranging from the frigid climate of Turin, swept by the winds of the Alps, to the nearly torrid shores of Naples and Palermo. The historical divisions of the country forming numerous petty States has been favourable to the growth and development of many small centres of learning, and when Italy became a united nation, local influence was found

too strong to admit of the suppression of more than two out of the twenty-two universities then extant. Sixteen out of the twenty, namely, Turin, Pavia, Genoa, Bologna, Padua, Parma, Modena, Pisa, Siena, Macerata, Rome, Naples, Catania, Palermo, Messina, and Cagliari, are State Universities. Four, viz., the Schools of Ferrara, Urbino, Camerino, and Perugia, are independent institutes called *Università Libere*. They have their own patrimony, swelled by subsidies from the local municipalities and by the yearly fees paid by the students, but in every other respect their legal standing is that of the State Universities, and they are governed by the same rules and regulations. The degrees they confer are equivalent to those of other universities, and in the case of Camerino, they are actually of greater value, inasmuch as on the strength of an imperial rescript of 1753 issued by the Emperor of Austria, Francis I, to the School of Camerino, then a papal dependency, the degree conferred by this little university is recognized throughout the whole Austrian Empire.

The State Universities, however, enjoy several distinct advantages over the *Università Libere*. They are able to retain the services of the most eminent men, their scientific equipment is more perfect, their libraries are better stocked, and discipline is less lax. Their ancient and often glorious traditions cast a glamour over these venerable colleges which will be best understood by English university men. Pavia, begun by Charlemagne, illustrated by Baldus and Lanfranc; Naples, founded by Frederic II, the chivalrous son of Barbarossa:—Bologna, most famous of universities, founded in 1119 on the site of the ancient Law School of Theodosius, and which in the 13th century numbered 10,000 students of all nationalities, who, together with the doctrines of Irnerius, Azzo, Accursius, carried to the four corners of Europe the proud boast "*Bononia docet.*"

The following list will convey an idea of the subjects

dealt with in the obligatory lectures throughout all the universities :—

1. Legal Encyclopædia and introduction to the Civil Code.
2. Roman legal Institutions.
3. History of Italian Law.
4. History of Roman Law.
5. Roman Law.
6. Ecclesiastical Law.
7. Civil Law.
8. Commercial Law
9. Civil Procedure and Organisation and Functions of the Courts of Justice.
10. Criminal Law and Procedure.
11. Constitutional Law.
12. Political Economy.
13. Statistics.
14. Administrative Law.
15. International Law.
16. Finance.
17. Philosophy of Law.
18. Elements of Forensic Medicine.

There are, moreover, several free courses, which students are advised to attend, comprising such matters as Diplomatic History, State Accountantship, Exegesis of the Law, Maritime Law, Comparative Legislation, besides weekly classes where essays on legal subjects are read and discussed. Each university prescribes the order in which lectures should be followed during the course of the four academic years. This is, for instance, the programme laid down by the *Rector Magnificus* and the *Præses* of the Law Faculty of Pavia :—

I Year :

Legal Encyclopædia and introduction to				
Italian Civil Law	...	...	...	3 lectures weekly.
Roman Legal Institutions...	...	...	...	3 " "
Italian Legal History (Barbaric Laws, from the fall of the Roman Western Empire to Charlemagne)	...	...	...	3 " "
Statistics	...	...	...	2 " "

II Year :

Italian Legal History (the Law Schools, Feudal and Communal Law, Common Law—the Codes)	3 lectures weekly.
Italian Civil Code	3 " "
Roman Legal History	2 " "
Roman Law	3 " "
Commercial Law	3 " "
Ecclesiastical Law... ..	2 " "
Political Economy... ..	2 " "

III Year :

Roman Law	3 " "
Italian Civil Code	3 " "
Criminal Law and Procedure	3 " "
Civil Procedure and Judicial System	2 " "
Finance and Administrative Law... ..	3 " "
Philosophy of Law	2 " "

IV Year :

Criminal Law and Procedure	3 " "
Finance and Administrative Law... ..	3 " "
International Law	2 " "
Constitutional Law	2 " "
Elements of Forensic Medicine	1 " "

This sequence is merely given by the authorities by way of guidance, and need not be strictly adhered to. The student is free to enter his name for whatever lecture and in whatever order he pleases, provided only he reserves not less than *three* subjects for the last (fourth) year.

The same freedom governs the matter of examinations which are held in October and June, respectively the opening and the close of the academic year. Students who have been unsuccessful in the autumn sessions may again go up for examination in the following summer, and so on indefinitely without the formality of entering their names anew for admission to lectures.

At the end of the fourth year, when all the examinations of the different courses have been passed, the undergraduate

goes up for the final ordeal called *Esame di Laurea*. Three (and in some universities five) essays on subjects chosen by himself are submitted to a board of eleven examiners, and, like the student of the Middle Ages who used to nail his thesis to the college gate and challenge whomsoever to dispute it, he has in a subsequent *vivâ voce* examination to make good his propositions. If successful, he is proclaimed *Dottore in Legge*.

At this point the theoretical part of the young man's legal education may be said to have come to a close, and a second phase, of a more practical order, to be about to commence. For the better comprehension of what follows a few preliminary explanations may be necessary.

As in France, the legal profession in Italy is divided into two branches, the *Procuratori* (*avoués*) and the *Avvocati* (*avocats*). The *Procuratore* (who is somewhat akin to the English solicitor) need not have taken a degree; his term at the university is limited to two years; he cannot plead outside the jurisdiction of the Court of Appeal of the district in which his domicile is registered, and never in criminal cases before the Court of Appeal. He must be an Italian subject, and is sworn on his assumption of office. His fees are determined by law.

The *Avvocato* must have taken his degree; he can, with the assistance of a local *Procuratore*, plead before any Court of the kingdom (at the Supreme Courts of Cassation only after five years' practice). No oath is required of him, and he may be an alien. In some parts of Italy, as in Piedmont, Tuscany, and Sicily, the two professions used to be distinct, as was the case in Rome: "*Si jus suggerit aut præsentiam suam commodat amico, advocatus; si negotium suscipit, procurator*" (Cicero, *De Orat.*, Lib. II). It was the *Procuratore's* business to prepare the cases, communicate with the clients, instruct witnesses, and attend to the procedure. In Court his functions were of a humble and secondary nature; limited

in fact to the task of reading the written conclusions and of introducing the advocate to the Bench. In other parts of the country, notably in the Lombardo-Veneto and the Papal States, it was otherwise, and after the unification of Italy the two professions became practically merged into one. At the present day the distinction may be said to have almost ceased to exist, especially after the passing of the law providing that every *Procuratore* after five years' practice becomes *de jure* a barrister, and every barrister, after two years' practice, may enter his name on the rolls of *Procuratori*.

Besides the above-mentioned requisites, in order to become a *Procuratore*, the following qualifications are required:—

1. To be of age.
2. To present a certificate of good conduct.
3. To have spent at least two years in the office of a practising *Procuratore*.
4. To have passed a State examination before a Board of five members composed of judges of the Court of Appeal, lawyers, and the Public Prosecutor. This examination is both written and *viva voce*, special weight being laid on a correct knowledge of Civil and Criminal Procedure.

The following is a list of the qualifications required in order to be admitted to the *Ordine degli Avvocati* (Barristers).

1. Degree of *Dottore in Legge*.
2. Certificate of good conduct.
3. Proof to have passed at least two years, subsequent to having taken the above degree, in the chambers of a practising barrister, and to have during that period attended at least one-fourth of the sittings of the Court of the First Instance and of the Court of Appeal.

4. Proof to have passed an examination similar to the one required of the *Procuratori*, with special bearing on the application of general legal principles and of the provisions of the Code to practical cases.

Few faults can be found with this system of legal training in Italy, which strives not only to equip the student with an ample knowledge of the laws and institutions of his country, but also to broaden his mind by a sound and comprehensive general education. An objection, however, which has already been raised in the pages of this Magazine against the German University education, also holds good in the case of the Italian system. It has been seen that, according to the University regulations, students are advised, but by no means compelled, to go up for their examinations at the end of each academic year. The consequence is that many undergraduates, either through indolence or thoughtlessness, knowing that the examinations can be indefinitely postponed, only begin to set earnestly to work in the third or fourth year, with the result that, weighed down by the unexpected burden of "cramming," they must either devote an additional year to their studies, or give up all hope of taking a degree.

A sweeping reform is also to be desired with regard to the expounding of the Civil Code. This monumental work, an enlarged and corrected edition of the *Code Napoléon*, consists of three books and 2,147 paragraphs. The period of two years allotted to its study is entirely insufficient. The teaching of the Code practically resolves itself either into a hurried and perfunctory review of the law, or else into a monographical study of a single part, with the inevitable result of confusion in the first instance and deplorable blanks in the second.

It is an everyday occurrence that students leave the University in entire ignorance of such important matters as

the law of Contracts, the law of Inheritance, or the law of Real and Personal Property.

A complete knowledge of Civil law is essential, and this object is only to be attained by distributing the study of the Code throughout the four years of the academic curriculum, with yearly or biennial examinations.

Such as it is, legal education in Italy is open to both sexes, and is also equally open to the wealthy man and to the man of small means.

The following list of University fees will, better than words, convey an idea of the preliminary costs of a legal career in Italy, and show on what fair and democratic lines the system is carried out.

Admission fee (Matriculation)	. . .	40 francs.
Yearly fees (165 francs per annum)	. . .	660 „
Examination fee . . . . .	. . .	100 „
Diploma . . . . .	. . .	60 „

At the *Università Libere* these fees are even lower. Moreover, students in poor circumstances can be exempted from payment of even these trifling amounts, if, by diligence and good conduct, they obtain a certain average number of marks at the yearly examinations.

The fee required, in order to be enrolled among the "*Procuratori*" or "*Avvocati*," is 60 francs.

Women are allowed to study law at the Universities, and may take a degree, but they are not admitted to the Bar. In February last, however, the Chamber of Deputies by a large majority passed a Bill entitling women to practise as barristers (not as *procuratori*). The Bill still awaits the sanction of the Senate, and public opinion differs as to whether that august body will re-echo Ulpian's gibe about the *infirmetas sexus*, or in a gracious and chivalrous mood submit to the new spirit of the age.

V.—SOME DIFFERENCES BETWEEN ENGLISH AND COLONIAL LAW.

A FEW months ago the Society of Comparative Legislation threw out tendrils to distant parts of the Empire, and branches have been formed in those places, from which may be expected to proceed profitable work tending to unify, as far as may be possible, the legislation of the Empire in its many possessions. It is unnecessary to pause here in order to demonstrate the innumerable advantages, legal, commercial and social, which would spring from such unification, or to make clear that such would be a possible result. The existence and standing of the Society of Comparative Legislation is proof that some progress must have been made, and some practical results achieved, towards extending a knowledge of the legislation of countries other than our own, and thus influencing indirectly, if not directly, the making of the laws by Parliament. The object of the present paper is to deal with a section of the matter which the Society embraced, and with that to make an incursion into the wider domain of Comparative law.

Students of law may be divided into two great classes: those who view it from the academic, and those who approach it on its practical side. Each of these is somewhat inclined to underrate the other, so that when a legal subject is discussed by the one it is apt to be ignored by the other. Seldom does the same discussion of a legal subject interest both the academic and the practical lawyer, but when it does both parties are sure to profit by it. It is here submitted that the contents of the present paper and their treatment are of value and interest to all lawyers and students of jurisprudence. The comparison of the law on certain points affecting the same matters in England and in New South Wales is offered as a small contribution to the

general knowledge possessed by the practical lawyer, and for the purpose of enabling him more efficiently to deal with any business that may come before him. So close are the Colonies becoming bound to the parent kingdom by commercial relations, by the frequent interchange of residents, and by the extent to which the material interests of the peoples of each part are centred in the other part, that it is becoming necessary for the legal practitioner in England to know something of the laws of the other part of the Empire, and *vice versa*. To the student of jurisprudence and to the academic lawyer the same contribution is offered, so that they may have more material to assist them in the study of the juristic systems of the Empire as a whole, and to enable them more fully to understand the conditions under which the Constitutions of the Colonies develop, and the causes which differentiate these Constitutions from the English Constitution. It may be safely assumed that Macaulay's schoolboy is dead, and that he has not left behind him many who possess the same omniscience. On this assumption the following remarks are set down, few, it may be, but sufficient to show that there is a field for the tilling from which a crop may be reaped by the practical lawyer as well as his academic brother.

The successful Colonial goes home to live in England, the needy Englishman seeks his fortune in New South Wales: each may still retain an interest in the land from which he has departed. The rich Colonial girl marries an Englishman: the marriage settlements may affect land in either country. Wills relating to lands in one place may be made in the other; and in many other ways it may happen that a knowledge of the law comparatively as it exists in each country may be advantageous or necessary.

The history of the Mortmain Act in England shows the conditions which gave rise to it, conditions which never obtained in Australia. The Act (9 Geo. II, c. 36) still in

force in England has never been adopted in New South Wales, and has been declared not to be in force there (*Whicker v. Hume*, L. R., 7 H. L. 124; *Lambell's Will*, 9 S. C. R., N. S. W., Equ. 94). It may be well to state here that, since the 25th July 1828, English Statutes are not in force in New South Wales of their own strength, but only when specifically adopted by the local Legislature. On that date came into operation the Act 9 Geo. IV, c. 83, by which a Legislative body was created in New South Wales, and it was specifically provided that up to that date English law was to be applicable to New South Wales. Notwithstanding that the Mortmain Act was in force in England at that date, it was decided by the Court that the conditions of the country rendered it inapplicable to New South Wales.

In 1845, by the Act 8 & 9 Vict., c. 106, it was enacted in England that all corporeal hereditaments should be deemed to "lie in grant," and it further provided (sect. 3) that a feoffment was not to operate as a conveyance of lands unless it were evidenced by deed. It is not necessary for present purposes to show historically how the Act 4 & 5 Vict., c. 21, made a release effectual to convey without a lease for a year. This provision in the English Act was adopted in New South Wales in 1842 by 5 Vict., No. 21, sect. 21, making a release sufficient, and on the repeal of this latter Act the provision relating to release was re-enacted in 1843 by 7 Vict., No. 16. But the Act 8 & 9 Vict., c. 106, has not been adopted in New South Wales, which brings about this position. In England, while incorporeal hereditaments "lie in grant," in New South Wales they can be conveyed only by "release." Further, in New South Wales, previous to 1842, as well as the lease and release, other forms, including feoffment, were used to convey real property. Now, while a feoffment in England must be by deed, in New South Wales a feoffment by actual livery of seisin may be made, and is effectual to transfer real property without a deed.

As the above Act of 1843 (Registration of Deeds) provides that when registration is used to give effect of livery of seisin a deed is necessary, it may be taken that a feoffment by livery of seisin—the contract evidenced by a note in writing under the Statute of Frauds—will seldom if ever be used. Thus it can be seen, that as regards conveyancing in New South Wales, historical learning is still necessary, and that in the consideration of disputed points there is likely to be more academic discussion in New South Wales than in England.

By the Registration of Deeds Act, 7 Vict., No. 16, all deeds and instruments affecting lands and hereditaments made *bonâ fide*, and registered under the provisions of the Act, shall have and take priority according to the date of registration thereof. Such registration is not notice, so that it can be seen how negligence to register may affect the protection afforded to a purchaser or mortgagee under a deed. Further, the doctrine of tacking may be qualified by the existence of registration, as, in view of the principle of registration, it is manifestly unjust to permit priority to be gained against a second mortgagee by a subsequent mortgagee. There has yet been no judicial decision on the point.

The Statute of Westminster the First, by which the limitation of the old Writ of Right was fixed, was approved by King Edward I in the third year of his reign, and subsequently, by the genius of the lawyers, the time of legal memory was determined by analogy to begin at the time then fixed, which was A.D. 1189 in the reign of Richard I. By the Prescription Act, 2 & 3 Wm. IV, c. 71 (passed in England subsequent to 25th July 1828), prescription from immemorial user, namely—from 1189, upon which title to incorporeal rights may depend, was altered, and a user of twenty years and upwards was declared to afford a presumption of immemorial user. As New South Wales was occupied by the English only at the end of the eighteenth

century (1770), it cannot be assumed by any polite legal fiction that user of the land in the Colony could date back to 1189. Nor has the Legislature of the Colony thought fit to adopt 2 & 3 Wm. IV, c. 71. So it happens that no title by prescription can be obtained to lands in New South Wales. In cases in the Supreme Court in Sydney (*Vickery v. Marr*, 4 S. C. R., Eq. 66; *Municipality of Waterloo v. Hinchcliffe*, 5 S. C. R. 273), the question of prescription was discussed but not settled. In these cases doubt was thrown upon the applicability in New South Wales of the rules applied in England prior to 2 & 3 Wm. IV, c. 71, as to the presumption of lost grants. The doctrine of immemorial user, and the presumption of lost grants, have in no instance been recognized by the Courts of New South Wales. This was shown in the case of *Sheehy v. Edwards, Dunlop & Co.* (N. S. W., 13 W. N. 166), where an interlocutory injunction was asked for to restrain interference with light to buildings. The learned Judge expressed himself as of the opinion that the doctrine of Ancient Lights was not applicable to the conditions of the Colony, as immemorial user could not be shown. This opinion has been supported in a recent case in New South Wales, where the right to light has been urged. As far as the case has gone, the Judges hold against the doctrine, but it is possible that the point may be taken to the King in Council.

In an early case decided in the Colony, *Boggs v. Hickie* (2 S. C. R. 211) the Full Court was appealed to from a decision by a Judge of the District Court (a Court analogous to the County Court), in which he had held that the doctrine of Market Overt was in force in New South Wales. The Full Court held that there could be no Market Overt in the Colony. This decision was subsequently approved in *Emblem v. McRae* (9 N. S. W. L. R. 182).

But while the New South Wales Legislature has not adopted the Prescriptive Act, it has, by 8 Wm. IV, No. 3,

adopted the English Limitation Act of 1833, 3 & 4 Wm. IV. c. 27. It may be here mentioned, that under the Real Property Act, by which Torrens' system of land registration and transfer is in operation in New South Wales (Act No. 25, 1900), no title to land adverse to or in derogation of the title of the registered proprietor shall be acquired by any length of possession by virtue of any Statute of Limitations relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of any such statute. Although the statute 3 & 4 Wm. IV, c. 27, barring the rights of persons other than the Crown, has been specifically adopted in New South Wales, the Nullum Tempus Act (9 Geo. III, c. 16) has not been so adopted. However, although there are no decisions actually declaring it to be in force, inferentially it may be considered to be locally applicable under the decisions in *In re Rogers v. Broughton* (10 N. S. W. L. R. 176) and *Att.-Gen. v. Milson* (12 N. S. W. L. R. 121).

Under the Real Property Act (Act 25, 1900), all titles are registered in the office of the Registrar-General, and a certificate is issued to the person entitled, a counterpart being kept in the office. The right to deal with the land is affected only by the transactions that are noted on the certificate. Mortgages, leases, &c., must be made on certain forms which alone will be noted; but no trusts will be recorded. So a mortgage or a lease in the Common law form cannot be noted. In the case of trusts under wills, settlements, &c., a caveat, or warning by the Registrar-General, is noted on the certificate, warning all persons that dealings only in accordance with such trusts will be recognised. As regards a mortgage under the Act the legal estate does not pass, and a mortgage shall have effect only as a security, but shall not operate as a transfer of the land thereby charged. However, the powers and remedies of a mortgagee are full.

Leases of lands in New South Wales, granted by the owners when in England, have been prepared by English lawyers in the Common law form, the fact that the lands were under the Real Property Act not having been taken into account. The writer, in his practice, has dealt with such, from one of which in particular serious consequences threaten the lessee. These consequences follow on a qualification of the equitable doctrine of "notice," which is contained in the Act (sect. 43). It is herein provided that, except in cases of fraud, no person dealing with a registered proprietor is to be concerned to inquire into the circumstances surrounding the registration of the proprietor, or be affected by notice, direct or indirect, of any trust or unregistered interest; and the knowledge that any such trust or unregistered interest is in existence is not of itself to be imputed as fraud. A case of great importance has been decided by the Full Court on this section. In *Oertel v. Horderu* (2 L. R., Eq. 37; N. S. W., 19 W. N. 65) the plaintiff was a lessee under a Common law lease of certain premises which were under the provisions of the Real Property Act. The registered proprietor sold to the defendant, and as the Certificate of Title did not show any notification of lease or incumbrance, the transfer gave the defendant the premises free from tenancies. The plaintiff, on being notified to give up possession, claimed for the unexpired term of his lease, but the Court held that the words of the Act were binding, and decided in favour of the defendant.

The practice of the Registrar-General's caveat in respect of trusts has much simplified the form of marriage settlements and similar instruments. A simple and clear declaration of trust is executed, and a copy filed. By this the prolix and expensive proceedings of articles for a settlement, and then the settlement itself, as is the practice in England, are saved; and the appointment of new trustees is easily

and cheaply effected, by a transfer of the land into the names of the new trustees, retaining the caveat. This does not seem to be fully appreciated in England, judging from the practical experience of the writer. He was instructed by a client in England to prepare a marriage settlement of lands in New South Wales, under the Real Property Act. A declaration of trust was prepared and forwarded, to be subsequently protected by the above caveat. The English lawyer who was acting in the matter advised that the English form should be followed, and the client had to pay high for the two sets of articles and settlement, through ignorance of the law in New South Wales on the part of the English lawyer.

On 1st July, 1863, primogeniture was destroyed for ever in New South Wales by the Act 26 Vict., No. 20, and realty, in the case of intestacy, was classed, for the purposes of distribution among the next-of-kin, as personalty. This Act was repealed by the Probate Acts, and the provision is now embodied in the Probate Act of 1898 (Act No. 13, 1898) (sect. 49).

Together with this radical change, other changes in relation to real property from the law in force in England are embodied in the Probate Act. On the decease of an owner of real property, his estate vests in the Chief Justice (sect. 61) until probate and letters of administration are taken out, when it vests in his executor or administrator. This legal estate is divested from his representatives, in the case of a purchaser or a beneficiary, by a short form of acknowledgment (sect. 83). In the hands of the representatives of the deceased, all his realty is equally and at the same time with his personalty liable for his debts of whatsoever kind *pari passu* (sect. 82). But no realty can be sold by an administrator except by consent of all the parties interested, or under an order of the Probate Court giving him power to sell (sect. 56). In 1890 it was enacted

that a wife's right of dower and a husband's estate by courtesy were not to arise after 15th December, 1890, but in place of these it was enacted that a husband or wife shall be entitled, on the death of the other intestate, to the same share in the real and personal estate of the other as a wife is by law entitled to in the personal estate of an intestate husband predeceasing her. This appears in the Probate Act (sect. 50).

The foregoing examples of the difference between the law in England and in New South Wales, in matters relating to real property, will be sufficient to show that the differences are great and important, and that an English lawyer may easily make mistakes when advising in respect of real property in New South Wales, if he assumes that the Common law of the State is the same as that of England, and that if he but adhere to principles he must be right. Certain points of difference may be well known, such as that the crime of rape is capital (Crimes Act, No. 40, 1900, sect. 63), and that marriage with a deceased wife's sister is legal (Marriage Act, No. 15, 1899, sect. 18); but it is hoped that the contents of this paper will awaken interest in an important subject, and that lawyers in other parts of the British Empire may add similar contributions.

EVERARD DIGBY.

VI.—THE IMPRACTICABLE COMPANIES ACT 1900.

MODERN statutory legislation appears to go sadly astray; instead of benefiting those it is intended to protect, it frequently only raises in them delusive hopes and leads them into costly and interminable litigation, whilst our judges are constantly complaining of the difficulties they find in construing recent Acts of Parliament. For instance, the enactments which provided, or rather

are supposed to have provided, for the payment of compensation to workmen injured in the course of their employment, have been so fruitful of litigation that it may truly be said that they have been found to be a delusion and snare to all parties affected, and have only proved to be of benefit to the lawyers.

Of recent legislation no Act of Parliament had more attention paid to it than the Companies Act 1900, and yet no statute is now more generally condemned for its unworkable character. A new broom usually sweeps clean, and it was popularly supposed that the Act would prove beneficial to joint stock enterprise; many of its provisions might have done so had it been more carefully framed in a uniform manner, so that its multifarious enactments might have had a clear construction placed on them. So many took part in advising on the Act that it appears to be a case of too many cooks spoiling the broth. The effect has been that no two lawyers arrive at the same conclusion as to the meaning of many of its provisions.

Having pointed out, on the Act coming into operation, that as it contained so many phrases of doubtful construction, with slight variations of expression in different sections, its interpretation would probably make a record for legal decisions, it may not be out of place if attention is now drawn to a few difficulties in construction which have occurred in practice through loose phraseology in drafting.

The time has hardly arrived for those difficulties to become the subject of discussion in the Courts. It is only when shareholders find a company has turned out to be a failure that they cast about to discover some loophole through which they may fasten their loss on some poor unfortunate individual for an innocent misinterpretation of a provision of the Act. Shareholders prefer to play the game of heads I win, tails you lose, with directors and others connected with a company. If they can derive any

benefit from a wrongful action they make no complaint, but willingly appropriate that benefit, and complacently shut their eyes to the means by which it was obtained.

The portion of the Act, which up to the present time has received the greatest attention in the Law Courts, is section 8, relating to the payment of commissions or receiving of discounts on what is termed underwriting shares. As a general rule, the transactions brought forward appeared to benefit the companies by securing the subscription of their capital, and the parties whose action was complained of apparently ran the risk of guaranteeing that subscription, but as the transactions were capable of being set aside, the Act only had the effect of misleading intending shareholders. The section appears to be wide enough to legally permit of something being done which its framers certainly never contemplated—the carrying out of what is popularly termed reconstruction—that is, when a company limited by shares, having exhausted its right to call upon its shareholders to subscribe further capital, desires to freeze out those who, having performed the contract they entered into to pay a fixed sum of money, are unwilling or object to pay a further amount.

This section 8 is limited in its application, as it only applies to “any offer of shares to the public for subscription,” but, although there may be some difficulty in defining the meaning of this expression, it will, when applied in a practical manner by Stock Exchange methods, amount to nothing.

The interpretation clause of the Act in its definition of “Prospectus” only makes confusion worse confounded. It defines the expression to mean “any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares of a company,” and the expression “Company” is defined as meaning “a company registered under the Companies Acts.”

As the "Companies Acts" are defined to mean "The Companies Act 1862 and the Acts amending the same," the effect has been to encourage the incorporation of companies in Guernsey and elsewhere, to carry on business in this country, the object of these incorporations being to avoid our laws and fiscal regulations. This proceeding we ventured to suggest would result from the Act, but although such companies may be legal where incorporated, they are elsewhere to all intents and purposes foreign corporations, and may find grave difficulties in carrying on business in this country, having regard to the precise enactments of sect. 4 of the Companies Act 1862. Under these circumstances, when our Courts are asked by the comity of nations to allow these corporations to appear, will they not apply the principle of International law followed in the extradition of criminals, and only extend that comity when they are satisfied with the *bonâ fide* character of the foreign corporation, and that it did not take place for the purpose of evading our laws, and moreover, that previously to carrying on business in this country, they have complied with those laws.

Whilst the interpretation clause defines the meaning of "company," it does not attempt to place any construction on the expression "offering to the public," which governs the definition of "Prospectus." We must therefore look to the Act itself to assist us. With respect to the variation in the two expressions used in the Act of "invitation" and "offer" before the words "to the public," the object for doing so is not clear. Was it intended to draw a distinction between the public being invited to make an "offer" for the company to accept and the company making an offer for the public to accept? There is some light thrown upon the expression "offer to the public" by referring to sect. 10, sub-sect. (4), which excludes a circular or notice inviting existing members or debenture holders to subscribe. As this sub-section

refers to an exception to the general provisions of the whole section, the application of the principle that the exception proves the rule suggests that it was the intention of the Legislature to compel the required information to be supplied to every person invited to subscribe, who was not an existing member or debenture holder, and that the word "public" is thereby defined. As the existing members or debenture holders would be deemed to have made themselves acquainted with this information, there would be no necessity to tell them over again what they would be presumed to know. It is much to be regretted that the Legislature should not have clearly defined its intentions without leaving it to the Courts to decide what was intended, a proceeding which places those whose duty it is to obey the law in a position of doubt and uncertainty, until somebody has had the temerity to go to the expense of being mulcted in law costs to ascertain what the law really is. As every man is supposed to know the law, expressions in Acts of Parliament should be clear of all doubtful construction, especially when, as in the present instance, acts are directed to be done with the result that anyone not performing the act becomes liable to be indicted as a misdemeanant. Should the Courts decide that the word "public" means all persons outside existing members or debenture holders of a company, the Chairman of The London Stock Exchange issuing a circular to his clients inviting them to purchase shares in a company in which they were not members, might find himself called upon by an outside advertising bucket-shop keeper to answer an indictment at the Old Bailey—a decidedly unpleasant position to be placed in when conducting business in a respectable manner.

Recently we had a practical example of the effect of sect. 10 in placing unnecessary difficulty in carrying out a thoroughly *bonâ fide* company. A few practical men thinking well of an invention proposed to form a small company to

exploit it. The preliminary expenses were to be £250, and the only member of the Board interested otherwise than by investing his own money, was the patentee, who was elected that the others might profit by his experience. As business men, they thought it would benefit the company if it were provided with more capital than they personally felt justified in investing, therefore they proposed to ask their immediate friends to join, for which a prospectus was necessary. In preparing this they were desirous of complying with every requirement of the Act. With the assistance of three solicitors they held several long board meetings in their efforts to do so, and after framing a document which consisted of 3,400 words, more than two-thirds of which were inserted pursuant to the provisions of the Act, they thought it wise as business men to instruct the private solicitor of one of the members of the board, to take the precaution of getting it settled by a well-known equity barrister, and the result was that he added 740 words, in addition to making seven marginal notes suggesting further additions.

This entailed such increased costs, that the preliminary expenses rose from £250 to £350. This was the only practical result of the Act, as all these additions in effect only transformed tweedledum into tweedledee, and even then counsel carefully added "my opinion is no protection." The company was never intended to be advertised in the press, but the subscription of its capital was to be obtained privately.

Section 4, sub-sect. (4), provides such a hard and fast line for the return of subscriptions within a stipulated time, that in some cases it entails great hardship. In one company no advertisement was inserted, the shares were being placed by private influence; but owing to the badness of the times it took a longer period to do so than was expected; many who were desirous of subscribing found themselves

for the nonce unable to do so, though they were prepared to subscribe later on, but the limit of the minimum not being quite reached within the stipulated period, owing to the directors (anticipating no difficulty) having fixed the amount payable on application at five times that required by the Act; they found themselves under the necessity of returning all the subscriptions, although they saw their way to obtain in a very short time the full amount required by the Act. As sect. 6 precludes a company from commencing business until the minimum subscription has been allotted and paid upon,—and at Common law every applicant has the right to withdraw his application and claim repayment of his deposit before allotment,—there would appear to be little reason for this hard and fast rule where no public advertisement of a company is made in a newspaper.

Section 9, requiring the filing of a prospectus, is a useful provision as a record, and applies to an intended company. When for safety a prospectus of an intended company was offered for registration under sect. 9, the registrar refused to register it because it did not contain the particulars required by sect. 10. As no company was registered but only intended, how particulars of an unborn babe could be given before it came into existence we are at a loss to divine. If the Company as registered differed from that described in the prospectus, an intending shareholder would not be bound by his application.

When so many pitfalls have been placed in the way of honest promoters and directors, can it be wondered that so many companies have been registered as what are termed prospectusless companies. In pointing out where so much money had been lost in companies, the writer of this article cited the London and Globe (which was a prospectusless company) immediately on its smash as one of the examples, remarking—"The loss of money caused by dishonest prospectuses is infinitesimal as compared with that lost by

" tips to buy on the Stock Exchange. The effect of the Act " will be to bring this most dangerous system of promotion " to the fore. No prospectus will be issued inviting sub- " scriptions for capital but 'for information only,' whereby " the Act will be evaded, all the shares having been pri- " vately subscribed will be worked off by 'tips to buy at a " premium.' In those cases, the investor has no remedy " against either the company or the promoter or directors, " his only claim is against the man who gave him the 'tip,' " who in ninety-nine instances out of one hundred is equally " as innocent as himself, in which event it is impossible for " him to make out any case. He buys goods, *i.e.*, shares, on " the market, and the principle *caveat emptor* applies. Why " should the Legislature pander to this gambling propensity, " by placing obstacles in the way of the promoter who " boldly advertises, 'I have something to sell, I don't go " round the corner to sell it, but I boldly declare what I " have to sell'; if the purchaser buys on a false and " fraudulent representation, I am liable in damages for " making it."¹

It has been stated that Government would bring in a Bill to avoid the evil of prospectusless companies: as at the time of writing this article it has not appeared, we presume that it is found not to be so simple a matter as anticipated.

It is impossible to provide that every company should issue a prospectus. If all the shares were taken by the memorandum of association there would be no need for any, but the evil to the public would be the same. In one case that came to our knowledge the promoter got dummies to sign the memorandum of association for the entire capital, and then induced his clients (he being a sharebroker) to purchase the shares at 200 and 300 per cent.

¹ *Responsibilities of Directors and Working of Companies under the Companies Acts 1862-1900.* By Anthony Pulbrook. London: Effingham Wilson. 1901.

premium, on the allegation that the company was so well thought of that all the shares were eagerly taken up, but he had an opportunity of picking up a few at the price offered. The bait took, and he even landed a Scotch banker.

The notorious London and Globe promotion was foisted on the public as a prospectusless company in a manner which the Companies Act 1900 would never have disclosed. Wright, in 1894, established a company called the West Australian Exploring and Finance Corporation, Limited, with a capital of £200,000, and in 1895 another called The London and Globe Finance Corporation, Limited, with a like capital. In 1897 he conceived the idea of amalgamating these two companies by forming a company bearing the same name as one of the two—The London and Globe Finance Corporation, Limited, with a capital of two millions. This company was the one in respect of which he was convicted. It paid the two companies, each having only £200,000 capital, £1,600,000 in its shares, or four times the amount of their aggregate capitals, for their assets. Thus no prospectus was necessary for the issue of four-fifths of the capital. Having distributed these shares without any prospectus, it presented audited accounts to the first meeting, showing a profit of £989,679:12s., paid a dividend, and carried half-a-million to reserve. This enabled the shares to be worked to a premium, notwithstanding the capital had been watered to the extent of three times the amount it stood at in the original companies. A circular was then issued to the shareholders (this under sub-section (4) of sect. 10 would have been outside the Companies Act 1900) offering them the balance of the capital.

After the liquidation, at the instance of a creditor, we had an opportunity of inspecting the books of that company, and spent a long time over them, with the result that, speaking generally, the Companies Act 1900 would not have interfered with Whitaker Wright's proceedings, which

entailed so great a loss on the public. Only in one way could it have been used to let light on his false balance-sheets, and that would be by the shareholders refusing to appoint an auditor, and then applying to the Board of Trade to make the appointment under sub-section (2) of sect. 21. An independent auditor thus appointed would probably have felt it to have been his duty to have acted—as he is called by the Court of Appeal—as a true watchdog, and enlightened the shareholders on the manner in which their balance-sheets were being manipulated.

The West Australian Company's last balance-sheet before the amalgamation, certified by the same auditors, showed a net profit during fourteen months of £952,650:16s. 9d. on a capital of £200,000. By these arrangements the public acquired their interests in the London and Globe, not on a prospectus, but by purchase on the Stock Exchange of shares which were quoted at a premium, probably on "faith of the false balance-sheets. The extent to which dealings were carried on may be understood when it is stated there are somewhere about 40,000 transfers recorded in some sixty big ledgers during the short period of the company's existence. There is one consolation, these business methods have worked their own cure, the public have found out that they do not make money by buying and selling shares on the Stock Exchange, and consequently the members of that institution now find themselves without business.

Owing to reports of improper action by high personages, we made a thorough investigation into the history of some of the shares acquired by a prominent member of the Government, with the result that we could not find the slightest scintilla of evidence to warrant any other assumption than that he bought 1,000 shares and paid £1,437:10s. for them, and was deceived in common with other members of the public and lost his money. The various transactions in the shares acquired by him until they were landed in his

name were most instructive, not only as demonstrating the futility of the Companies Act 1900 to cope with such transactions, but also the manner in which shares are dealt in. They were originally allotted as part of a block of 10,000 to Wright's valet, who, by one of the earliest transfers, transferred the block to a member of the Stock Exchange for five shillings consideration. He transferred the same block to another Stock Exchange firm for a like consideration by the next numbered transfer, registered the same day. From this date till the shares were purchased by the member of Government, a period of less than two years, there were no fewer than twenty-two transfers, of which nineteen were for five shillings consideration, in blocks of from 10,000 to 78,300 (many of the transferees being members of the Stock Exchange), except two under 10,000, viz., one of 3,500 to a clerk in the company's office, who eleven days after transferred them to Wright: he, two days after, in another block of 5,195, transferred them to his valet. The four transfers in which market price consideration was inserted as having been paid for the shares were 1,754 shares for £3,946 : 10s. to Whitaker Wright, 4,870 for £5,478 : 15s. to an official of the company, and 1,500 for £1,425 to an official of another of Wright's companies, and the last to the member of the Government, in whose name they remained till the company wound up about eighteen months after. Some of the transfers for 5s. consideration were dated and registered before the transferors had acquired the shares. No Act of Parliament could prevent these proceedings, but they represent the manner in which what is termed "making a market" is carried out.

Having regard to the fact that the auditor in the London and Globe Corporation never gave any information to his employers, the shareholders, of the extraordinary manner in which the company's accounts had been manipulated, either as auditor or afterwards as liquidator, although after acting

for nearly six months in the latter capacity he made a report to them, it may fairly be asked if the provisions of the Companies Act 1900 relating to audit are of utility, except as regards the power to appoint auditors by the Board of Trade. There is an old saying, you may take a horse to the water but you cannot make him drink, so you may give chartered accountants as auditors power to make requirements, but it does not follow that they will exercise that power.

It is noteworthy that the official receiver who occupied an independent position could within a very short period after he was appointed to take charge of the company's affairs enlighten the shareholders as to the manner in which their money had been squandered and the extraordinary share transactions carried on by Wright; and this points to a means of preventing company frauds far superior to those contained in the Companies Act 1900. Now that Government is deriving an annual income of over half-a-million from fees paid by shareholders, why not devote a portion of that amount to investigating the affairs of public companies, by giving the official receiver the right to investigate and report on the management of every company winding-up voluntarily, when evidence is supplied to him that such an investigation would be for the public benefit. Nothing stops "respectable" fraud so much as publicity. If those who holding "respectable" positions connive at fraud thought it possible that their names and secret misdoings would be brought to the light of day, we should hear less of company frauds.

To prevent the evils of prospectusless companies attack the evils themselves. The Committee of the Stock Exchange have it in their power to materially assist by not recognising dealings in shares of companies which have not obtained a quotation. So long as they grant settlements in these companies the evil will continue. As the transactions are carried out by placing shares in the names of nominees for

the purpose or transferring them, much might be done by increasing the period of liability as past members during the first five years from the date of the incorporation of the company, and by amending sect. 30 of the Companies Act 1862 preventing the entry of trusts on the register, by declaring that all shares shall be the property of the person whose name is entered on the register, unless the trust is stated, but absolving the company from responsibility on account of any trust, and making the *cestui qui trust* jointly liable as a present and past member.

The difficulty in construing the Companies Act 1900 is not exceptional. When we hear of pages of amendments to Bills in Parliament, can it be wondered at? A draftsman in preparing a Bill endeavours to make each section act in harmony with all the others, but if parts of his work are interfered with, the amendments are very liable to disturb that harmony, and when a number of Bills are hurried through at the end of the Session this want of harmony is not detected. As it is frequently the custom for Bills not to come into operation for some time after they are passed, why not delay the Royal Assent for a period of two months to enable the wording to be discussed by the public and reported on by those called upon to carry out the enactment. If the latter discover any difficulty in construction, let them suggest amendments which they think will more accurately define the intentions of the Legislature, and let those amendments and not the principle of the Bill be brought in again, considered and approved by Parliament, before the Royal Assent is given.

ANTHONY PULBROOK.

VII.—RECENT DECISIONS UPON THE MONEY-LENDERS ACT.¹

DURING the brief period of its existence *The Money Lenders Act* 1900 has experienced a somewhat chequered career. The Act had scarcely been in operation five months before its main provisions—its very *raison d'être*—were rendered wholly nugatory by the decision of Mr. Justice Ridley in *Wilton & Co. v. Osborn*.²

This was an action by a firm of money-lenders to recover £56, the amount of a promissory note given by the defendant to the plaintiffs.

The defendant had originally obtained a loan of £40, for which he had given a promissory note, which had been renewed 14 times, each renewal costing £6. Having thus repaid £84, and being desirous of paying off the capital still due, the defendant entered into negotiations with the plaintiffs, who demanded a promissory note for £60, repayable in four quarterly instalments of £15 each, the whole to be payable immediately upon default of any one instalment. Eventually the defendant gave a promissory note for £56 upon similar terms. Default was made upon the first instalment so that the whole became due, the interest working out at 160 per cent.

By sect. 1, sub-sect. 1 of the Act, when proceedings are taken in any Court by a money-lender for the recovery of money lent, and there is evidence that the interest in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus premium, renewals, or any other charges are excessive, and that in either case the transaction is "harsh and unconscionable, or is otherwise such that a Court of Equity would give relief," the Court may re-open the transaction and grant relief to the person sued.

¹ 63 & 64 Vict., c. 51.

² [1901], 2 K. B. 110.

Upon the facts, as stated above, Mr. Justice Ridley found that the interest charged "must be regarded as excessive, and that the whole transaction was in the sense that the charges made were excessive and extortionate, harsh and unconscionable." But the learned judge also decided that the words "or is otherwise such that a Court of Equity would give relief," were not alternative, and only gave completeness to the definition of "harsh and unconscionable," and since a Court of Equity would not grant relief merely because the charges or interest were excessive, no relief could be given, although the bargain was undoubtedly "harsh and unconscionable, in the sense that the charges made were excessive and extortionate."

This unfortunate decision was expressly followed by Mr. Justice Channell in *Barnett v. Corunna* (*Times*, 16th June, 1902), in which the learned judge openly displayed his hostility to the policy of the Act. The construction placed upon this section of the Act by Ridley and Channell, JJ., was declared by the Court of Appeal in the case of *In re a Debtor* ([1903], 1 K. B. 705) to be too narrow. A construction, according to the Master of the Rolls, which rendered nugatory the manifest intention of the statute, was not the proper way to construe an Act of Parliament. In the course of his judgment the learned judge declared that the interest or charges might be so excessive as to render a bargain harsh and unconscionable, even as against a borrower who was of full age, and who stood in no special relation to the lender. "But in considering whether such interest is excessive," added Lord Justice Cozens-Hardy, "the Court must have regard not only to the rate of interest, but also to the risk incurred by the lender and to all the other circumstances of the case."

In delivering judgment in the case of *Levene v. Greenwood*,¹ Mr. Justice Channell declared that he had never concealed

¹ *Times*, March 22, 1904.

his dislike of the Act as it stood, since it gave no rule upon which a judge might act in considering whether he should re-open a transaction or not. The wording was not as clear as it might be. At present a judge had to construe as best he could what was intended by the words "excessive interest" and "harsh and unconscionable bargain." One day perhaps the Legislature would make the Act a little clearer.

The facts of this case were of a precisely similar character to those in *Wilton & Co. v. Osborn* and *Barnett v. Corunna*.

The first transaction took place in January 1903, when £200 was lent for four months at a charge of £50, repayable in four monthly instalments. There were renewals, further loans for another £200, and repayments amounting to £321:15s. On September 15th, 1903, a promissory note, the subject of this action, was given to secure £345, the amount still due, repayable by six monthly instalments of £57:10s. Default was made with the second instalment, and consequently in accordance with the terms the whole became payable. It is well to observe that the plaintiff was Mrs. Levene, registered and trading as "R. Leslie," that the business was in fact carried on by her husband as "manager," and that the defendant, a farmer and government contractor, got into communication with the plaintiff through the usual advertisement in a newspaper.

In addition to his notes of hand, the defendant had given a charge upon his freehold property, but whether this was by way of further charge does not appear. Upon the original loan for four months the rate of interest was 75 per cent., and assuming £400 to have been advanced in January, the interest claimed for the nine months works out at 220 per cent. If the actual dates of the advances are taken, of course the interest works out much higher. "The question was," said Mr. Justice Channell, "whether in the case before him the interest charged was excessive, and the transaction harsh and unconscionable. Where a borrower

was under a disability, as in the case of bargains made with expectant heirs, he could understand that the Court would have power to review the transaction. Also where the lender, seeing that the borrower was in such a position that he must submit to any terms which the lender liked to make, took an unfair advantage of the borrower. But when one had to deal with a person who, although not a scholar, was a man of business, why should he be not allowed to say that he would pay £50 for a loan of £200 for four months as if he was buying any other commodity? For his own part he could see nothing unconscionable in a lender asking the borrower what he was prepared to give for a loan, and the borrower fixing any amount he might be willing to pay. Applying that to the present case, he thought that was the transaction with which he had to deal.

The defendant thoroughly understood what he had to pay for the loan, and he could not see that the rate of interest was excessive or the transaction harsh or unconscionable. So far he saw no reason for reopening the bargain. Then came a fact which he thought, although he had some doubt, altered the case. By the terms of the bargain the money was repayable in four months by instalments, and in the event of any one instalment being unpaid the whole balance of the loan remaining unpaid became payable. The defendant, as he admitted, understood that the principal became due, but he did not understand that if he failed to pay his first instalment the result would be that instead of paying £50 for the loan of £200 for four months, he would pay £50 for the loan for one month only.

That transaction, which was difficult for everyone to understand, had the effect of about trebling the rate of interest. Money-lenders of course thoroughly understood the effect of that clause which had been their mainstay for many years. In his opinion a case such as that, where one party thoroughly understood the effect of a bargain and did

not explain to the other party ignorant of the effect, came within the section. That being so, there would have been jurisdiction for the Court to relieve the defendant of a portion of the amount payable when the first promissory note became due. The defendant had with full knowledge agreed to pay interest at the rate of 2s. per pound per month, and he would order the defendant to pay the principal remaining unpaid and interest at that rate giving him relief from the payment of interest over that amount. In calculating the amount due, payments already made by the defendant should be taken to have been paid first in respect of interest."

Now 2s. per pound per month is 120 per cent. per annum. Where Mr. Justice Channell derived this figure from does not appear. The original rate agreed by the defendant was 75 per cent.

This decision would appear at first blush to be perfectly equitable, but Mr. Justice Channell entirely overlooked several most important of the attendant circumstances. In the first place, the plaintiff, in endeavouring to obtain an enhanced rate of interest on the original loan and renewals alike, had been guilty of fraud, and was therefore not entitled to any consideration at all. In such a case a Court of Equity would at the most only have decreed repayment of the sum actually received, with interest at 5 per cent.

Secondly, Mr. Justice Channell misunderstood the real nature of the security. It is true that this was nominally only the defendant's own promissory note, and a possible charge on his real estate, but the true security was the man himself.

And thirdly, the numerous renewals and large repayments made by the borrower form strong evidence that the latter was in the power of the lender, and compelled to submit "to any terms which the lender liked to make."

Money-lenders of the class we are considering do not lend at haphazard. In every case before lending they make careful inquiries as to the social character and financial position of the borrower. They have their agents in every town, and for a trifling sum obtain the necessary information, not omitting to debit the borrower with about six times the amount of such costs under the name of an "enquiry fee." They take no risks. Occasionally the biter is bit, but the money-lender's cry of "bad debts" is almost wholly false. A glance at the balance-sheets of so-called money-lending banks shows that the undertaking of usury is highly remunerative. For instance, the Carlton Bank, Limited, according to the annual report for 1893, lent upwards of £33,000 during that year, and paid 6 per cent. on the preferred shares with a bonus of $1\frac{1}{2}$ per cent., and 25 per cent. on the deferred shares with a bonus of 10 per cent. free of income tax. Many of these institutions borrow money at 7 to 8 per cent. and then make another 10 to 12 per cent. on the money. The Holborn Advance and Deposit Bank, for instance, offered by advertisement in the daily press £2 per month on each deposit of £100. In reply to an inquiry, the manager of this bank wrote: "The rate of interest or charge on re-investments is sufficiently high to leave us a good margin of profit, or else, of course, we could not afford to pay such a high rate as 24 per cent."

Mr. Justice Channell, so I understand, is opposed *in toto* to the policy of the Act. He believes in what I may term the older conception of the theory of Freedom of Contract. In his view, "an agreement enforceable at law" ought to be enforced. If persons make a bad bargain they must put up with the consequences, and ought not to expect the Courts to re-make them for them.

Accordingly he treated the first transaction at 75 per cent. as a contract to be enforced in its entirety. The usual rate

charged by money-lenders on first transactions is 60 per cent., so that 75 per cent. might appear to be the rate which the defendant might be willing to pay on all transactions. But although the defendant was willing to pay, and so agreed, 75 per cent. for a short period, it does not follow that he was so willing for a long period, and it is quite clear that he never assented to the 220 per cent.

Mr. Justice Channell's view appears to resemble that which Professor Holland calls the "objective" theory of contract. "Is it the case," asks the professor, "that a contract is not entered into unless the wills of the parties are really at one? . . . Or should we not rather say that here, more even than elsewhere, the law looks, not at the will itself but at the will voluntarily manifested? When the law enforces a contract it does so to prevent the disappointment of well-founded expectations, which though they usually arise from expressions truly representing intention, yet may occasionally arise otherwise."

"If, for instance, one of the parties to a contract enters into and induces the other party to enter into it, resolved all the while not to perform his part under it, the contract will surely be good nevertheless . . . Indeed, when the question is once raised it is hard to see how it can be supposed that the true *consensus* of the parties is within the province of law, which must needs regard, not the will itself, but the will as expressed by one party to the other, taking care only that the expression of will exhibits all those true characteristics of a true act which have already been enumerated."

It is true that in a sense the outward expression of the will is in law dominant. The inner agreement is an inference of fact which must be proved, and in some instances that inference is not allowed to be disproved. But without reference to will, the expression of agreement would be meaningless. A contract is essentially an affair of the will;

but even when an absolute *consensus ad idem* is established the operation of such facts as mistake, fraud, misrepresentation, undue influence, and duress, upon the consent embodied in the agreement, may vitiate it wholly or create a flaw which renders it liable to be destroyed from one side.

Just as there can be no contract unless there is a true consensus, so there can be no consensus unless both parties are free to contract. To a large extent Sir Henry Maine was correct when he said that the progress of society was from status to contract. In primitive societies obligations are mainly the creatures of custom. Custom is modified, as Sir Henry has shown, by three successive agents—Fiction, Equity, and Legislation. By the end of the 18th century the golden age of equitable jurisprudence was over in this country, and with the growth of Individualism, which was such a marked feature of the rise of Industrialism, legislation was chiefly occupied in removing obstructions to political and commercial progress.

In this great movement usury became involved. Bentham in his *Defence of Usury*, and Turgot in his *Mémoire sur le Prêt à Intérêt*, published in 1790, were the first to advocate the removal of all legislative restrictions upon money-lending. These writers declared that all legislative interference with the contract of loan had its origin in superstition; that money, like all other commodities, possessed its value in the market, which was determined by the relation of supply and demand; that those who had security to offer would always be able to borrow at the market rate; that those who had no security must pay a premium in proportion to the risk; that they were the best judges of that premium, and were and ought to be at liberty to give or decline it as they thought fit, and that any attempts to protect the ignorant, inexperienced, simple or necessitous, were vain or mischievous.

It was the adoption of these views which led to the repeal

of the Usury Laws in this country in 1854, a result largely attributable to the Free Trade movement.

At the commencement of the 19th century in almost every country usury laws were in force restricting the legal rate of interest. As the result of the same movement these restrictions were abolished. Upon the continent, with the exception of France and Russia, the theory of the freedom of contract was adopted so far as a legal maximum was concerned. In South America and Australasia the theory was adopted earlier, but North America was left almost wholly untouched by the movement. With this doctrine as expounded by Bentham I largely agree, but it is vitiated by one vital flaw. It ignores altogether the question: "What is freedom?"

Long before the doctrine of freedom of contract had been mooted, what may be termed a counter-movement had come into operation. Centuries before the decision in *Chesterfield v. Janssen* in 1750, the Court of Chancery had given relief upon equitable grounds to certain classes of persons in cases of contracts which would have been enforced in the Common Law Courts. This result was no doubt largely due to that tender regard for the interests of the great landed proprietors characteristic of the times, and which was reflected from a landlord House of Commons upon a bench of judges largely in sympathy with their ideas.

This doctrine, intended primarily to preserve intact the great landed estates, was most probably derived from the Civil law of Rome, the reason then assigned being that "often sons loaded with debts for borrowed moneys, which they use in extravagance, plotted against their parents' lives."

But for the crystallisation of equitable jurisprudence and the rise of legislation, this doctrine might have been extended by the Courts from the small class of privileged persons to the general public.

I have already dealt in this *Review* (August, 1901) with the origin and history of usury and the development of the equitable doctrine in connection therewith. I need only state here that this doctrine supplies the answer to my former question "What is freedom?"

Centuries of experience from every country on the face of the globe have demonstrated the uselessness of restrictions upon the rate of interest. No legislation which the wit of man can devise will ever prevent evasions of statutory restrictions. Nay more, such restrictions only tend to render still more onerous the terms exacted by usurers.

So far I agree with the Benthamite doctrine. I also agree that as a rule the economic laws of supply and demand determine the rate of interest. This is certainly the case with the well-to-do borrower, but it is far otherwise with the necessitous borrower. For him the rate of interest is fixed by the necessities of his condition and the rapacity of the lender. Indeed, the more necessitous he is, the higher the rate of interest he has to pay.

Mr. Rothschild's belief expressed in 1818 in reference to small manufacturers and tradesmen has been amply confirmed. "I believe," he said, "that were the usury laws repealed great advantage would be taken in many cases of the necessities of such persons, by the lender demanding probably two or three times the rate of interest from them as their security as would be required in discounting bills of first or second rate houses. Therefore it appears to me that the less opulent should be protected."

Take the case of a wealthy landowner who borrows a large sum from his bankers upon gilt-edged securities, or of a prosperous city merchant, whose note of hand is readily negotiated. Here the risk is nothing: the current bank rate determines the interest. On the other hand, an Irish peasant borrows just sufficient to pay the rent of his mud hovel or to save his scanty crop from distress, or a small

London tradesman wants a temporary loan to meet a bill, with which to renew his stock or to tide over a bad season's trade. Here the risk is everything. There is no competition, as in the case of the rich man, to keep down the rate of interest. Money he must have on some terms, and above all secrecy is a *sine quâ non*. The lender may lend or not as he pleases. Competition is on his side. He may select his victim from a hundred necessitous borrowers, and long experience has taught him how to make his calculations, and how to reimburse himself for such loss as he may chance to suffer, by the extortionate rate of interest inflicted upon those who by themselves, their sureties or relatives, are ultimately made to pay.

"Do the parties to such contracts of loan," asks Mr. Justice Byles, "stand on level ground? One side bets on the risk voluntarily with his eyes open, the other is made to bet blindfold, whether he will or no, with such odds as are dictated by necessity and secrecy. Is it even a fair gaming contract? Are not the dice loaded?"¹

So far we have only considered the welfare of the individual borrower. Society is now rightly regarded as a living organism. It is not a mere collection of independent units. Just as the whole body suffers if one of its members is diseased, so society ultimately pays the penalty for the sins and misfortunes of its units. A higher conception of humanity has arisen. In primitive communities, the family, the clan, or the tribe was everything, the individual nothing. In modern society, the interests of the nation as a whole are paramount, and the individual must conform, not so much for his own sake as for the general welfare. Thus freedom of contract is limited in every direction. Exploitation of labour, the curse of modern industrialism, has been checked and held in restraint by Factory Acts, Mines Regulation Acts, Truck Acts, and countless other measures, having for

¹ *The Usury Laws*, p. 32.

their object the prevention of men and women bartering their labour for less than a living wage under insanitary and unhygienic conditions, which entail the physical and moral degeneration of the nation.

So, too, many agreements are void, because they are contrary to public policy or to morality. The Legislature has decided that wagering and gaming contracts, agreements for "differences" in stocks and shares and other commodities, shall likewise be void, not so much because the individual gambler may be inconvenienced, but because whether he loses or gains his character is demoralised, and he becomes a less useful member of society. Moreover, the evil is not merely self-regarding. Its consequences are far-reaching. They result in loss of honest labour, in insolvency, with its attendant loss, poverty and misery to others, and frequently in fraud and crime.

The evil consequences of money-lending at high rates of interest are precisely similar. "Whenever," wrote Mr. Justice Byles, "an impartial Parliamentary Committee shall institute a searching inquiry in the proper quarter, they will find that interest at 100, 200, 300, 500 per cent. per annum and more, is amongst vast multitudes paid, or promised to be paid, for the use of money; they will find reckless speculation promoted, borrowers ruined, and the resources of the country misapplied and wasted; they will find in every Court of Common law the most cruel actions constantly brought to enforce these extortionate demands; actions in which the law, so far from being, as she ought to be, the handmaid of justice, is in reality prostituted and made an accomplice in perpetration of the most iniquitous gambling and robbery."¹

This prophecy has been more than fulfilled. Before the Select Committee of 1897, evidence of the wide-spread operations of money-lenders of the most extortionate, over-reaching and fraudulent character was forthcoming *ad*

¹ *The Usury Laws*, p. 47.

nauseam, operations which resulted not only in ruin to the borrowers themselves and their families, but in the impoverishment of their *bonâ fide* creditors, and the misdirection and dissipation of large portions of the national wealth. The economic results of traders carrying on business by means of capital borrowed at high rates of interest are wide spread. Obviously every trader endeavours to hold up as long as possible, but when at last he is compelled to suspend payment, it is found that all his assets have been exhausted by the exorbitant interest he has been paying, or are charged in favour of the money-lender.

It is with agriculture even more conspicuously than with commerce that the immediate economic and social evils of usury are seen. The testimony from all countries is similar. I have already in this *Review* (February, 1902) referred to the prevalence of usurious bargains between the sowcar and the ryots in India, and the resulting disastrous consequences, but I do not hesitate to quote once again from the judgment of Sir Douglas Straight, delivered when sitting as Chief Justice of the High Court of the North-Western Provinces. "It is," he declared "bargains of this description between the small village proprietors and the money-lenders that are gradually working the extinction of the former class in many of the country districts, and producing results which are not only a serious scandal but a positive mischief. For it must be borne in mind that the pecuniary difficulties of the persons I have mentioned are as often as not the result of misfortune rather than improvidence, and that bad seasons have as much to do with causing them as waste or extravagance. Whichever way it be, this is certain, that the money-lenders, as anyone who sits in this Court must see, are to an alarming extent absorbing the proprietary interests in the village communities, and that the body of ex-proprietors is enormously on the increase."

In Ireland the sowcar finds his counterpart in the gombeen man, who is a well-known character in rural districts. Into his hands are falling the peasant proprietorships; the owners either emigrating to America or remaining as "broken men" at home. To the familiar devices of the gombeen man may be traced much of the ruin which has fallen on the Irish homesteads. "The system of agricultural finance to which the humbler and weaker class of borrowers are obliged to recur," declares the Rev. T. A. Finlay, "is essentially vicious, a social danger, and something of a public scandal. It is the duty of all who have the interests of the agricultural classes at heart, to protect them against its iniquities."

In England, where a system of large holdings prevails, the evil is not so marked. Nevertheless, the evidence before the Committee proves that the case of the English small farmer differs little from that of the Indian ryot or the Irish peasant proprietor.

It cannot be disputed that the money-lenders of the class under consideration are social parasites, living upon the necessities of the impecunious and unfortunate members of society. They serve no useful purpose whatsoever. They are a social pest and curse. The view adopted by some advocates of the conservative theory of contract, that they should be regarded rather as philanthropists who risk their money, is entirely false. As I have shown, they take no risks, and their business is highly remunerative.

The Legislature, whilst recognising the inequitable character of these transactions, appears to me to have lost sight of the economic and social standpoint.

Usury has been defined by Mr. W. M. Harrison as "exploitation resulting in an unconscionable bargain." This conception has found expression in many Continental codes of law. As with us at first the conservative theory of contract was adopted. All restrictions upon the rate of

interest were in 1867 abolished, and in 1871 all penal provisions were dropped throughout the German Empire. The evils of unrestricted freedom, however, speedily made themselves felt. The extreme conclusions of Bentham and the advocates of unrestricted freedom of contract were rejected by such writers as Professor Von Jhering, the leading German jurist. "Unfettered freedom in commerce," declared this writer, "is a licence to extortion, a pass for robbers and pirates to the purses of all who fall into their hands. Alas for the victim! One can understand that the wolves cry out for freedom. If the sheep join in the cry they only prove—that they are sheep." This strong language from a sober German professor of jurisprudence is certainly remarkable. These views were embodied by the Legislature in the law of 1880, amended by the law of 1893, wherein the usurer is treated as a criminal. Section 302 (A) is as follows:—

"Whosoever exploits the necessitous condition, the careless improvidence, or the inexperience of another person in connection with a loan or a prolongation of credit, or any bilateral contract intended to produce the same economic result, and thereby secures the transfer or promise to himself or a third person of pecuniary advantages which exceed the customary rate of interest, to such an extent that under the circumstances of the case such advantages are in striking disproportion to the consideration provided, shall be punished as a usurer with imprisonment up to six months and a fine not exceeding three thousand marks. Deprivation of civil rights may also be decreed."

By section 302 (B) a doubly severe penalty is imposed upon those who either cloak advantages of the kind referred to above, or take them in the form of bills, or allow debtors to pledge their honour for their performance. All contracts which contravene the provisions of the above sections are void.

By section 302 (c) "Any person is liable to the same penalties, who, with knowledge of the circumstances, acquires a claim of the kind previously mentioned, and either disposes of the same to a third party or enforces the usurious advantages."

Another useful provision is to be found in the law of 1893, which enacts that "Any person who engages by way of trade in money and credit businesses is bound every year to make up the account of every person who in the course of the year has entered into a transaction of this nature with him, and in consequence thereof became his debtor, and within three months from the end of the year to render to him a written extract from such account showing the growth as well as the origin of the debt."

This provision does not apply to isolated transactions, nor to banks and other specified institutions, nor to ordinary business transactions between registered traders, but by section 362 (D) of the law of 1880, "any one who practises usury *habitually* or as a trade shall be imprisoned not less than three months and fined from one hundred and fifty marks to fifteen thousand marks. The Court must also pronounce deprivation of civil rights."

In Switzerland we find a similar legal conception of usury. In the Canton of St. Gallen it is the exploitation of the borrower, coupled with any of the following circumstances, viz.: (1) not handing over to the borrower the loan in full; (2) unjustifiably high interest; (3) stipulations for any other advantages, under whatever form, to the detriment of the borrower.

In the Canton of Solothurn it is exploitation of the borrower, coupled with the taking of interest or other advantages out of proportion to the usual price of money and the risk run. Any over-reaching whatever is usury.

By the Penal Code of Zurich the following are deemed aggravating circumstances attending exploitation, viz.:—(1)

where the usurious advantage is very large; (2) habitual practice of usury by the lender; (3) attempts to veil the real nature of the transaction; and (4) taking bill of exchange as security. To these the Canton of Aargau adds two more, viz.: (5) taking advantage of confidential relationship; and (6) the fact that the lender himself has produced the embarrassed circumstances of the borrower.

We are now in a position to consider how Mr. Justice Channell's complaints may be met. An "unconscionable bargain" is, as we know already in English law, a contract when the parties are not on equal terms. Numerous decisions explanatory of "equal terms" exist, but the adoption of the German definition of exploitation of the necessitous condition, the careless improvidence, or the inexperience of the borrower, would settle the principle upon which the Act should be construed. If with any of these circumstances excessive interest is combined, then the equitable practice should be followed, and the borrower only allowed to recover the money actually lent with interest at 5 per cent. and no costs on either side. This was the course pursued by the Chief Baron in an Irish case, where the interest worked out at 2,800 per cent. per annum. In this case, however, there does not appear to have been any evidence of oppression beyond the extortionate rate of interest.

The definition of excessive interest is exceedingly difficult. Each case must rest upon its own peculiar circumstances. To one class of contracts the equitable doctrine of relief against penalties contained in the Indian Contract Amendment Act 1899 might be adopted. By sect. 4, a contract which is in effect a stipulation for increased interest from the date of default may be a stipulation by way of penalty. The illustration given in the Act is the form in general use here, *e. g.*, A. borrows £100 from B. and gives him a bond for £200 payable by five yearly instalments of £40, with

a stipulation that in default of payment the whole shall become due. This is a stipulation by way of penalty.

If default is made in the first payment, the interest becomes extortionate. If this is the original transaction, and there is no question of unequal terms, then justice would be met by allowing the lender to recover the amount actually lent, with interest calculated as if all the instalments had been punctually paid, together with his costs.

It has been said that parties to a contract contemplate the performance and not the breach. It is true that every *bonâ fide* borrower at the time of the bargain expects to repay the instalments punctually. The experienced money-lender, on the other hand, knows that such expectations are almost invariably disappointed—the money-lender contemplates the breach. In so far therefore as default is anticipated by the money-lender, such a transaction is a mere trick to obtain an extortionate rate of interest and to place the borrower at the mercy of his creditor.

If, as in *Levene v. Greenwood*, the borrower does not understand the real nature of the transaction, *i. e.*, an enhanced rate of interest upon default, there is no true contract. The parties are not at one. In such a case the most that the money-lender ought to get is the return of his money with interest at 5 per cent. without costs.

Another recent decision somewhat difficult to follow is that in *Lazarus v. Blake* (*Times*, Feb. 29, 1904). In this case the defendant was a young man, twenty-five years of age, who had had a previous transaction with the same money-lender, for which he had been sued. For the loan of £100, the defendant gave a promissory note for £160, payable in three instalments. Default was made on the first, the interest working out at 720 per cent. per annum. The defendant was abroad and did not appear at the trial; but evidence was given that he had means, and could have borrowed the money from his solicitor. In delivering judg-

ment, Mr. Justice Phillimore said, "The burden was on the debtor to satisfy the Court that the interest was excessive, and that the transaction was harsh and unconscionable. No tribunal could deal with the transaction on the bare statement that the interest charged was so many hundreds per cent. The question of the money-lender's profit, the use of the money, and the insurance against risk had to be considered. In this case the money-lender knew that the debtor was in a position to pay, and there was also reason to suppose that he knew the debtor could have got the money elsewhere. There was some evidence that he could have got the money on much easier terms if he had asked for it from his solicitor. The loan, however, was a short one, and the uncertainty of recovering it was great. There was a conceivable figure he had arrived at. The money-lender had even chances of getting his money back, and the charge of the amount of the loan for that chance was not unreasonable, and he was entitled to charge on that, interest at five per cent., and insurance at five per cent. This amounted to 110 per cent., and he was of opinion that the money-lender was entitled to get back principal and interest at that rate."

I confess I find it difficult to follow this reasoning. Surely if "the money-lender knew that the debtor was in a position to pay," the chances that he would be paid were more than even. The chances would certainly appear to be at least ten to one that he would be paid.

In fact, the question of risk hardly enters into the transaction at all, and 30 per cent. would appear to me to have been a reasonably ample interest upon the security offered. Holding strongly the view that the usurer is a social and economic pest, serving no useful purpose whatever, I submit that he should be discouraged, and not allowed to take advantage of obtaining high rates of interest, even from willing borrowers of full age and understanding. It is

contrary to the public weal that persons should be encouraged to agree to pay extortionate rates of interest. Under German law such a contract would be declared void, as an exploitation of the careless improvidence of the borrower, and in addition Mr. Lazarus would have been sentenced to six months' imprisonment and to a fine of £150. I do not advocate such stringent measures, but I do urge that the Act should be administered according to the intention of the Legislature.

In a recent unreported case (*Harris v. O'Connell and others*), Mr. Justice Ridley acted upon these lines.

Upon a bill at three months for £500 drawn by one civil servant, accepted by another, and indorsed by a substantial firm of stockbrokers, the plaintiff, a money-lender, advanced £275 for a charge of £75 as interest, which worked out at 109 per cent. per annum. The defendants paid into Court £275, together with a sum representing interest at the rate of 30 per cent., and Mr. Justice Ridley, treating the bill as a good marketable security, declared 30 per cent. to be amply sufficient under the circumstances.

A few such decisions as this would go a long way to check the present system of extortionate interest.

Although I do not think it necessary, yet in order to avoid any misconceptions, the provisions relating to "undue influence" in the Indian Contract Amendment Act might with advantage be adopted in amendments to the Money-lenders Act. It is true that in *Levene v. Greenwood* Mr. Justice Channell declared that a contract, when the borrower is in such a position that he is compelled to submit to the money-lender's terms, is an unconscionable bargain. It is also true that the old equitable doctrine that the parties are not "upon equal terms" might be applied.

It may safely be assumed as a general rule that renewals upon high rates of interest are obtained by undue influence.

By section 2 (3), "When a person who is in a position to

dominate the will of another enters into a contract with him and the transaction appears on the face of it or on the evidence adduced to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other."

The example given in the Act illustrating this sub-section is as follows:—"A., being in debt to B., the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B. to prove that the contract was not induced by undue influence."

By section 3 "any such contract may be set aside either absolutely, or, if the party who was entitled to avoid it has received any benefit, upon such terms and conditions as to the Court may seem just."

It will be observed that the addition to our equitable doctrine of "equal terms" is the casting the burden of proving the contract to be in fact fair, just and reasonable upon the lender. It may be urged that money-lenders would decline to lend upon such moderate rates of interest as 30 per cent., and that would-be borrowers would suffer in consequence. Upon the Continent, their place has been supplied by Agricultural Co-operative Banks, which lend money at moderate rates upon personal security alone. The system has been fully described by Mr. Wolff, who has been instrumental in introducing them into this country. In towns a development of the Continental *Monts de Piété* might be attempted. In France these municipal pawnshops lend at 7 per cent., in Madrid at 6 per cent., in Germany at 12 per cent., and in Belgium at 7 per cent. Some such institutions as these were contemplated by the London County Council in 1894.

In the meantime it is essential to the proper administration of the Act that its policy should be clearly defined. For this purpose the German Code might be followed, in

so far as it declares usury to be the exploitation of the necessitous condition; the careless improvidence, or the inexperience of the borrower.

When this conception is once grasped, and the pious dread of infringing the sacred theory of contract is abandoned, the task of amending the Act presents no difficulties which cannot be surmounted by the application of the equitable doctrines already obtaining in British or British Indian law.

HUGH H. L. BELLOT.

VIII.—CURRENT NOTES ON INTERNATIONAL LAW.

The Venezuela Arbitration Award.

THE judgment of the Hague Court in favour of the blockading Powers (Great Britain, Germany, and Italy) having priority to the other States for their claims for damages out of the fund assigned by Venezuela (see these Notes, Vol. XXVIII, 340—343; XXIX, 210—212) was hardly what was expected, even by the blockading Powers, to judge from the terms of the protocols; and it is criticised by so eminent an authority in International law as M. Renault, as likely to encourage strong States to resort to forcible measures against weak States in order to strengthen their legal position if they afterwards go to the Hague Court. The substance of the contentions on either side has already been given in these Notes; and certainly, if the decision is to be taken as adopting the contention put forward by the British counsel that the Court cannot inquire into the propriety of the measures employed by Powers for enforcing their claims, there would seem to be a danger that a Court, which was

set up in order to obviate recourse to forcible measures between States by substituting arbitration according to the recognised principles of law, may be turned into a machine for giving legal sanction to acts of force exercised by a stronger State against a weaker one in order to obtain a more favourable position before the Court. The argument that it is unfair that creditors who are not diligent should be put on an equality with those who incur expense and risk by taking action to enforce their claim, is not necessarily sound in public International law because it is recognised in most systems of private law. It is more important that the peace of the world should be kept than that a creditor nation should be allowed to choose its own time and methods for enforcing its claims, however just. Moreover, the analogy from private law is based on the assumption that the means taken are just, or that the Court can satisfy itself that they are such. Quite apart from any question of the merits of the blockaders' case, which no doubt were considerable, it seems regrettable that even a single decision of the Hague Court should give colour to the idea that might may make right. Full recognition of the blockading Powers' rights could have been combined with regard for the rights of third parties and motives of general international justice and expediency, by allowing the former a preference for the amount of the costs incurred by them in bringing the fund into Court, but otherwise treating all the claims as equal.

The Berne Railway Transport Convention.

Attention has recently been called to the fact that Great Britain is not a party to the Berne Convention of 1890 for the international railway transport of goods which is now in force in Germany, Austro-Hungary, Belgium, Denmark, France, Italy, Luxemburg, Holland, Russia and Switzerland, modified by arrangements of 1893, 1895, and 1898.

The legal aspects of the Treaty have been fully considered by MM. Poincard and Lyon Caen (*Journal de Droit Int. Privé*, 1892, 1893, 1894): but the short effect of it is to make an international transport for goods, containing uniform conditions as to the carriage of goods, the liability of the carrier, and the rights and remedies of the goods owner. The goods must be carried by railway lines which have been entered by their Governments with the Central Office at Berne as subject to the Convention: the railway which accepts the goods for carriage at the outset is responsible for the through transit of the goods until delivery: an action on such a "through contract" lies only against that railway, or the railway on whose line the damage to the goods is caused: an elaborate scale of damages for delay in delivery is provided: and the several railways which carry goods on a through transit have the right of recourse against each other for their proportionate shares of any indemnity paid by one of them. The Convention governs the greater number of the Continental railways: and many actions under the Convention in French, German, Swiss, and Austrian Courts are reported in the *Journal de Droit Int. Privé* (1894—1903 *passim*). It is to be noticed that judgments pronounced in one State under the Convention are declared executory in the other signatory States, subject to the conditions and the forms required by the *lex fori*, but without going into the merits of the case (*révision du fond*), except judgments awarding damages, in addition to the costs of the suit, against plaintiffs who have had their suit dismissed; and no security for costs can be demanded for judiciary actions brought on a railway international transport contract. A possible difficulty in the way of England adhering to the Convention is the doubt which has been raised whether the term "railway" is applicable only to an actual transit by railway (*i. e.*, by land), or will include carriage by sea in steamers belonging to

railways. In the case of Denmark, however, steam ferry connections between Danish and Danish and Swedish and Danish and Mecklenburg railways have been placed under the Convention:¹ and there seems, therefore, little ground for doubting that steamers forming connections with British and foreign railways would be equally included. With the establishment of great railway systems like the Siberian Railway, the Canadian-Pacific, and the projected Trans-African railways, uniform through contracts offer a great advantage to merchants over the separate arrangements and separate legal liabilities which transit through several countries involves, and British Chambers of Commerce may be expected to point this out to our Government.

The Turco-Bulgarian Convention.

The Convention signed on April 8th between Turkey and Bulgaria with regard to Macedonia, will be welcomed as a sign that the States most interested in a peaceful evolution of the political and racial difficulties there are endeavouring to deal directly with the question; and it will facilitate the proper execution of the Austro-Russian scheme for amelioration of the political condition in Macedonia. Necessarily this Convention deals primarily with the executive measures to be taken, Bulgaria pledging itself to prevent upon its territory the formation of revolutionary committees and armed bands, and all acts and conspiracies directed against the Turkish Empire, and to punish persons who have sought refuge in her territory after committing acts against public peace in the neighbouring provinces; Turkey on its side agreeing to apply the Austro-Russian reforms in Macedonia (Salonika, Monastir, and Kossovo), and grant an amnesty to persons made prisoners or exiles on charges of crime, or guilty of revolutionary acts, or convicted of political

¹ From information kindly supplied by Dr. Hindenburg, Advocate of the High Court, Copenhagen.

offences, except persons committing dynamite outrages against public property: and civil and judiciary posts there are to be open to Bulgarians. Meanwhile progress is being made with the Austro-Russian scheme of reforms, and the departure of the foreign officers, including British representatives, chosen for the work of reforming and organising the gendarmerie of the disturbed districts, marks the beginning of the plan approved by the Powers for removing the dangers of previous maladministration.

The Anglo-French Agreement.

If the Anglo-French Agreement of April 8th is to be considered as falling within the scope of the Arbitration Treaty of October 14th last,¹ its chief importance is its endeavour, by a comprehensive arrangement dealing with all outstanding differences, to sweep into the net of the Treaty all possible causes of future disagreements. Lord Lansdowne's covering despatch is a valuable commentary on the details of the Agreement, tracing the diplomatic history of each question, and explaining the new clauses of the Agreement relating to it. The statement attributed to M. Delcassé that the negotiations between the two Foreign Offices took as their basis the principle that each Power should consent to a diminution of its rights in spheres in which the other had predominating interests, and that thus French concessions in Newfoundland and Egypt should find a counterpart in British concessions in West Africa and Morocco respectively, seems to be borne out by the form and contents of the Treaty. Judging of the arrangements as a whole, as the despatch suggests is necessary in order to decide the advantages gained by each of the two countries, it is difficult to resist the impression (which seems also to have been formed abroad) that France gets more than she gives, and

¹ See these Notes, Vol. XXIX, 88.

that while the Agreements go a great way towards clearing away the causes of rivalries between the two nations, a more satisfactory result would have been reached if it had been possible to make the concessions still more complete, *e.g.*, if France had consented to forego all fishing rights in Newfoundland and all political rights in Egypt, in exchange for the free hand which she now gets in Morocco. As regards Newfoundland, the only concession of undisputed rights by France is the right of fishery on the French shore, which the language of the Treaty of 1783 certainly seems to point to being a right exclusively reserved to French subjects, but which that Treaty and its predecessor certainly also seem to confine to the methods of fishing and subject of fishery in practice at the time of the Treaty of Utrecht, and which could not by anticipation cover the new industry of lobster factories attempted to be set up there. This is treated as the concession of a legal right which requires a territorial equivalent in West Africa, and this is certainly a generous one, the rectification of the frontier in Nigeria apparently involving the cession of eight thousand square miles of territory. Similarly as regards Egypt, England is now relieved of any opposition by France to the employment of the Egyptian funds contributed by the Caisse de la Dette for Egyptian purposes, as also of any demand by France for a time for evacuating the country; but no consent is obtained from France to the abolition of Capitulations there or of the Consular jurisdiction, when the time comes to demand it, such as might be expected to have accompanied recognition of Egypt being definitely under British influence; and a concession of great value is made to the French holders of Egyptian securities by postponing the time at which Egypt can redeem them. It is true that on the face of it the British declaration that the political state of Egypt will not be changed has its counterpart in the similar

declaration by France as to Morocco, but the intrinsic value of these two declarations vary considerably when the different nature of the rights of other nations in Egypt and Morocco respectively is taken into consideration. Again, in the clauses relating to Morocco, it is to be observed that the Agreement not to fortify any part of the Moroccan coast between fixed limits is expressly excluded from applying to the points now occupied by Spain on the Moorish shore of the Mediterranean—and if Spain cedes these to France, the freedom of the Straits of Gibraltar is not secured. With regard to Siam and the New Hebrides the *status quo* is maintained, though in Siam the French interpretation of the Anglo-French Agreement of 1896 is adopted, viz., that French and British spheres of influence are created in the portions of Siam east and west of the Menain Basin. Still, even though the concessions by France may not have the extrinsic or intrinsic value of those made by Great Britain in this arrangement, Lord Lansdowne's despatch points out that it is a substantial gain to us to get rid of the existence of rights which, though of little value in themselves, have, in effect, sterilised British enjoyment of rights in territories recognised as within the British sphere of influence: and it is no mean result to have been able to negotiate so comprehensive a scheme of mutual concessions between two Colonial Powers. The real value of these Agreements, however, in the eyes of international lawyers, will be the reality which they can give to the Arbitration Treaty between Great Britain and France as a practical instrument for the peaceful settlement of disputes.

G. G. PHILLIMORE.

IX.—NOTES ON RECENT CASES (ENGLISH).

Lawrence & Bullen Limited v. Aflalo has now been reported (L. R. [1904], A. C. 17), and it is clear that—as seemed to be the case from the newspaper reports—the decision went precisely on the lines upon which we have from the first contended that it should go. (See this *Magazine*, February 1904, at p. 218.) It is, therefore, not necessary to insist further on this. The curious point is that three Chancery judges held, apparently without doubt, that what the House of Lords unanimously regards as a question of fact was a question of law. This confusion between the law and the facts is no new thing in equity. It was such a confusion which produced that fiction, constructive fraud, by which a man might be held to be guilty of fraud though the Court was convinced that he had no fraudulent intention whatever. Owing to the Common law judge having, in addressing juries, clearly to distinguish evidence of fact from points of law, he is not so liable to fall into this error. And it is to be noticed that it was a Common law judge (Vaughan Williams, L.J.) who first pointed out that in this case the question was simply one of fact, and being one of fact, one decision on it was alone possible.

By the way, we had recently to comment upon the airy manner in which the Lord Chancellor declared his readiness to overrule cases which had long stood and had been regarded by conveyancers as good law. (*Law Magazine*, May, 1903, p. 354.) Apparently his Lordship has reconsidered his views on this point. At any rate, he spoke, in his judgment in *Lawrence & Bullen Limited v. Aflalo* (*supra*), with something approaching reverence of the case of *Sweeting v. Benning* (16 C. B. 459), and almost with horror of the suggestion that the House of Lords might reverse it. Perhaps

it is only when a decision has become the basis of the practice of conveyancers that his Lordship considers the reversal of it a matter of small moment; or perhaps his present utterance arose simply from the fact that he agreed with *Sweet v. Benning* (*supra*).

The most recent example of the lawyer's best friend—"the man who makes his own will"—has been found in the late Mr. Hanbury. His will has been before Kekewich, J., and the Court of Appeal (*In re Hanbury, Hanbury v. Fisher*, L. R. [1904], 1 Ch. 415). Kekewich, J., held that the testator had made an absolute gift of all his property to his widow, and the Court of Appeal has affirmed this decision, Cozens-Hardy, L.J., dissenting.

The gift in the will was in this form: The testator left the whole of his property to his wife "absolutely in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces." Now, while probably he never thought whether he was creating a trust binding in law on his wife or not—since it did not cross his mind that she would for a moment think of doing anything else than carrying out his last wishes—still it seems clear that he intended to preserve the *whole* of his property for his nieces should they survive his wife. This is not sufficient to take away an absolute gift where it is clearly absolute. But where this is the case and the gift can be read as merely contingently absolute—the contingency here being the death of the nieces in the wife's lifetime—it is more in accordance with the testator's intentions to read it so. There is no repugnancy, as Vaughan

Williams, L.J., seems to think, in doing this. Legacies to women are constantly so construed where the gift is held to be absolute only if she has no children. This was the view taken by Cozens-Hardy, L.J., whose dissenting judgment, we may humbly say, seems to us more reasonable than either of those of the other two Lords Justices.

One of the last decisions of Byrne, J. (*Carmichael v. Evans*, L. R. [1904], 1 Ch. 486), seems a somewhat stern construction of a very usual clause in a partnership deed—namely, the clause giving the other partners the right to expel a partner who “is addicted to scandalous conduct detrimental to the partnership business,” or is guilty of “any flagrant breach of the duties of a partner.” Here the junior partner had been convicted and fined the full penalty for travelling on a railway without a ticket. A report of the conviction having got into the newspapers the defendant gave the junior partner notice of expulsion. Byrne, J., held she was entitled to do so, as the conviction was for dishonesty, and, as the magistrate’s remarks shewed, of continued dishonesty. This, in his Lordship’s opinion, was a breach of the duties of a partner. This seems at first sight to be giving rather an extensive scope to the duties of a partner.

Surely the doctrine that a purchaser has no notice of the trusts, where the trustees are declared to have advanced the money invested out of moneys belonging to them on a joint account, was intended to apply only to trusts which would not affect the purchaser unless he had notice of them? In *In Re West and Hardy’s Contract* (L. R. [1904], 1 Ch. 145), Farwell, J., has held that it binds a purchaser who knows that one of the trustees is a married woman, and that being interested in the trust, she cannot make a good title,

according to the doctrine laid down in *In re Harkness and Allsopp's Contract* (L. R. [1896], 2 Ch. 358). How a married woman's capacity to convey can be affected by notice of the trusts is hard to see, and if it is not affected, then on the law as it stands she cannot make title.

A wholesome doctrine was reiterated and enforced by Farwell, J., in *In re Skinner, Cooper v. Skinner* (L. R. [1904], 1 Ch. 289). As every one knows the rule is to give executors and trustees the costs of taking accounts. This rule, however, is not without limitations, and when the beneficiaries have been compelled to ask for an order for an account, by the negligence and failure of the executors and trustees to keep or supply proper accounts, the executors or trustees must expect in future to have to pay the costs themselves.

J. A. S.

In two cases decided in the Irish Courts, namely, *Beggan v. M'Donald* (2 L. R. Ir. 560), and *Fahey v. Dwyer* (4 L. R. Ir. 271), it was held that a prescriptive right of way could be acquired in respect of one tenement, by user for 40 years, against another held for a term of years under the same landlord. Although this is inconsistent with the law of easements in England, Chitty, J., in 1886, in the case of *Harris v. De Pinna* (L. R., 33 Ch. D. 238), thought that he was bound by those judgments. It would seem that he was of opinion that the Prescription Act 1832 (2 & 3 Wm. IV, c. 71), created a new form of easement which in the course of the case he distinguished as a "base easement." The Act, it is true, says that where an easement such as a right of way shall be enjoyed for full 40 years, the right is indefeasible, unless it shall appear that the right was enjoyed by consent in writing. But this only dealt with the extent of proof, leaving still under the Common law the essentials of an

easement and the mode of acquiring one. It is, of course, a principle of the Common law that an easement in the nature of a right of way must be annexed to the fee simple, both of the dominant and the servient tenement. It is another principle, that an incorporeal hereditament can only be granted by deed. And prescription arises only on the fiction that a grant has been made, the evidence of which has been lost. This being so, the very nature of an easement requires that the fee of the dominant and servient tenements should be in different owners. Lord Kenyon, in *Large v. Pitt* (2 Peake, Nisi Prius Cases, 152), said, that a man could not prescribe for a way or other easement over his own soil, for the two rights were inconsistent. Where there had been a unity of possession there could not be a prescription in respect of any right exercised during the time of such possession.

The point has again arisen in *Kilgour v. Gaddes* (L. R. [1904], 1 K. B. 457; 73 L. J. R., K. B. 233), and the Court of Appeal have overruled the dictum of Chitty, J. Romer, L.J., emphasises the rule that a right of way "cannot be acquired merely for a term of years. It must be acquired in favour of the dominant as against the servient tenement in respect of the fee simple in both tenements, and the enjoyment must be as of right."

It is a human desire to limit one's liability and to escape the consequences of one's own shortcomings, and on the other hand to reap as full a reward as may be for one's more or less earnest efforts. The immunities, at any rate, were sought for by the defendants in *Price v. The Union Lighterage Co.* (L. R. [1904], 1 K. B. 412; 73 L. J. R., K. B. 222); and *Borthwick v. Elderslie Steamship Co.* (L. R. [1904], 1 K. B. 319; 90 L. T. R. 187; 73 L. J. R., K. B. 240). They are both carrier's cases, the one on the river,

the other at sea; and in each, damage arose through the negligence of the bailee. A carrier's liability was well expressed by Lee, C.J., in 1750, in *Dale v. Hall* (1 Wils, at page 282), "Everything is negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the Act of God or the King's enemies; and a promise to carry safely is a promise to keep safely."

To relieve themselves from this, the Lighterage Company announced that "they were not liable for any loss or damage to goods which can be covered by insurance"; and the Steamship Company stipulated that they were not to be "accountable for the condition of goods shipped nor for any loss or damage thereto arising from . . . any cause whatsoever; nor for the consequences of any act, neglect, default, or error of judgment" of any person in the company's service, "nor from any other cause whatsoever." But the forethought and precaution of both were ineffectual, for the Appeal Court held (reversing the decision of the Court below) on the strength of *Phillips v. Clark* (2 C. B., N. S., 156), that where in a carrier's contract there is a clause open to two constructions, one where there is negligence and one where there is not, it requires special words to make the clause cover non-liability in case of negligence. So that shipowners who wish to relieve themselves from the obligation of seaworthiness in their vessels, must say so, as must all who claim to escape the consequences of neglect in a contract.

The question whether a claim to "compensation in respect of any lands or of any interest therein which shall have been . . . injuriously affected by the execution of works" under sect. 68 of the Lands Clauses Act 1845, is a chose in action within the meaning of sect. 25 (sub-sect. 6) of the Judicature

Act, 1873, has been raised by the case of *Dawson v. Great Northern and City Railway Co.* (L. R. [1904], 1 K. B. 277; 90 L. T. R., K. B. 20), in which the owners of premises injured by the construction of a tunnel by the defendants, assigned to the plaintiff with a lease of the premises, the right to compensation from the defendants; and the plaintiff sued in her own name. The Court held that the claim was one in the nature of damages for a wrong, and "in the apparent absence of authority" was not a legal chose in action within the Judicature Act. Reference was made in the judgment to a passage in a well-known text book, which was thought to favour the view that a tort might be a chose in action. But if assault or libel were the injury for which compensation were sought, the operation of such a rule would be somewhat ludicrous; and under it, maintenance and champerty would attain to the antiquarian interest of fines and recoveries.

The Married Women's Acts have taken from the husband some of the advantages allowed him by the earlier law, but he has still the privilege of sharing with her the liability for her post-nuptial torts, for though by sect. 1 of 45 & 46 Vict., c. 75, she may be sued alone, yet, since *Seroka v. Kattenburg*, (L. R., 17 Q. B. D. 177), he may be joined with her as defendant. This was done in *Beaumont v. Kaye and Wife* (L. R. [1904], 1 K. B. 292; 73 L. J. R., K. B. 213), which was an action for libel by the wife during coverture. The claim was met by the husband pleading payment into Court, without denying liability, and by the wife pleading certain paragraphs denying publication. These paragraphs were struck out by a Judge in Chambers as being against Ord. 22, r. 1, which says that a sum of money so paid in "shall be taken to admit the claim or cause of action in respect of which the payment was made." This was of course supported on the ground that, as the defence of the husband

was for himself and wife jointly, there must on his defence be judgment against them both, while on the defence put in by the wife there might be another and inconsistent judgment.

In interpreting a contract according to what is presumed to have been within the contemplation of the parties, there must necessarily be an element of uncertainty. In *Stockdale v. Ascherberg* (L. R. [1904], 1 K. B. 447; 73 L. J. R., K. B. 206), the plaintiff by agreement in writing let a house for three years to the defendant, who agreed to pay "all taxes, rates, assessments and outgoings of every description" except property tax. During the term the landlord was compelled by the Urban District Council, under the Public Health Act 1875, to relay a defective drain at a cost equal to the rent of the premises for a year and a-half, and succeeded in recovering the amount from the defendant; the Court holding that it could not be regarded as outside the contemplation of the parties that the local authorities would make such an order. Probably there were circumstances as to the condition of the premises not set out in the report, but unless these were such as to force themselves upon the notice of a person making an ordinary inspection, it would seem that though an order from the local authority may have been in the contemplation of the landlord, it would be much less likely to enter into the mind of an intending tenant. Comparing this case with those noted at pages 228 and 229 of the February number of this Magazine, which arose out of the postponement of the coronation celebrations, it would seem that there might have been a greater probability of a hirer of a steamboat contemplating an instability, from political, family or other changes, in a fixture for a naval review.

When in this country certain circumstances are regarded as infringing an essential moral interest, how far will an English Court enforce a contract made in such circumstances in a foreign State where they are less severely regarded? The question was dealt with in *Kaufman v. Gerson* (L. R. [1904], 1 K. B. 591), where a married woman in France entered into a contract, valid in French law, to repay money which her husband had misapplied, under threats that, unless she did so, he would be prosecuted. Mr. Dicey, in his *Conflict of Laws*, page 148, says that our Courts will not enforce any contract, though valid in a foreign country where it is made, which is opposed to the law of England or to the morality supported by the law of England. This is practically identical with the quotations in the case from Story and from Westlake; and the Court refused to enforce the contract, as to do so would "contravene what by the law of this country is deemed an essential moral element."

Is a child *en ventre sa mère* a "dependant" within the Workmen's Compensation Act 1897? Sect. 7, sub-sect. 6 (a) of the Act describes the class in England and Ireland as "such members of the workman's family specified in the Fatal Accidents Act 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death"; and the persons specified in the Fatal Accidents Act (9 & 10 Vict., c. 93, s. 2) are "the wife, husband, parent and child of the person whose death shall have been caused by the accident." The question comes down therefore to, whether a child *en ventre sa mère* can be a child wholly or in part dependent upon its father's earnings, and has been decided in the affirmative by the County Court Judge at Boston, Sir Sherston Baker, Bart., in the case of *Day v. Markham and the Guardian Assurance*

Co., Limited, noted at page 164 of the *Law Journal* of March 26th last. This is the first time the question has arisen under the Workmen's Compensation Act, and the learned Judge supported his decision by a series of authorities from the time of the Digest to the present day, showing how in Roman and in English law such an unborn child has been regarded as entitled to rights that would have been its undoubted privilege if alive.

T. J. B.

SCOTCH CASES.

The Partnership Act 1890 is one of three useful codifying statutes applicable to the United Kingdom. It does not, however, profess to be an assimilating statute, and in point of fact it does little to bring together the divergent principles of English and Scottish law. As a rule the divergences in the case of partnership are unimportant and are mainly confined to the adjective law of insolvency and bankruptcy. Hence *Waugh v. Carver* ([1793], 2 H. Bl. 235) was a leading case alike in England and Scotland (Smith's L. C., 9th ed., vol. 1, p. 877; Ross's L. C., vol. 3, p. 426) until it was dethroned by *Cox v. Hickman* in 1860 (8 H. L. C. 268). The old rule was that sharing profits was conclusive evidence of partnership; the new rule laid down in *Cox v. Hickman*, and embodied, first in the Act of 1865, and now in the Partnership Act 1890 (sect. 2), is, that while sharing profits is *prima facie* evidence of partnership, it does not of itself make anyone a partner.

The relaxation of the stern rule of old times opened a door to abuse by enabling persons who had a substantial, and possibly a ruling, interest in a business to escape liability for its debts, while laying hold of a large share of its profits. In England this abuse was checked at an early

date by *Pooley v. Driver* (L. R. [1876], 5 Ch. D. 458), where it was held that if the agreement gave the lender an interest in the business substantially equivalent to that of a partner, he could not escape liability for partnership debts. In Scotland the same result was reached in *Brown & Company's Trustee v. M'Cosh* ([1898], 1 F. 52) and in the recent case of *Stewart v. Buchanan* ([1903], 41 Sc. L. Rep. 11). It is noteworthy that in both of the Scotch cases referred to, the judge of first instance so read the provisions of the Partnership Act as to leave him no option but to declare the so-called lender free from liability. In *Stewart v. Buchanan*, the Sheriff-Substitute (Davidson, Glasgow) disposed of the legal aspect of the case in the following short note to his interlocutor:—"The position of the defender Buchanan is precisely that defined in section 2 sub-section 3(d) of the Partnership Act 1900. There is evidence both oral and written that he was not a partner, and no proof has been adduced that he held himself out to third parties." Fortunately, as we think, the Sheriff Principal (Guthrie), and afterwards the Court of Session, took the opposite view. The grounds are sufficiently set forth in the following passages from the judgment of Sheriff Guthrie:—"This case goes further than any previous case, for it presents us with a company started in a building belonging to the defender—I believe started at his suggestion and for his benefit—with a man of no means installed under a written agreement as his manager, apparently independent, and alone empowered to sign the name and conduct the business, but bound hand and foot to the defender, who fits up and furnishes the premises with money *ex facie* lent, advances all the money required to start the business, has a voice in the appointment of all servants, has an auditor, and has power to appoint a cashier with co-ordinate powers with the manager This defender was the real owner of the business,

and he permitted Saunders to participate only as one pays a servant by giving him a share of profits."

It is well known that in Scotland trial by jury in civil cases is not nearly so general as in England, and that it is of comparatively recent growth. It is true that prior to the institution of the Court of Session in 1532, facts in civil as well as in criminal cases were often proved before an assize or jury, but between 1532 and 1815 jury trial in Scotland was almost entirely confined to crime. In the latter year a special court for the ascertainment of facts in civil cases was created by statute and continued till 1830, when its powers were transferred to the Court of Session. The system of jury trial thus introduced never took firm hold in Scotland, and as in most cases an option remained to have the facts determined by evidence taken before a judge of first instance, the Court of Session, and very often the parties themselves, preferred that this course should be followed. The Court of Session Act of 1825 (6 Geo. IV, c. 120) was, however, the means of extending jury trial in Scotland, by introducing an appeal to the Court of Session for trial in this manner of cases originating in the Sheriff Courts. Its terms have been held to be obligatory where the sum sued for is above £40, and where either of the parties exercises his right of appeal. At its date no great harm was done, but of recent years it has become an engine of oppression, in consequence of the enormous increase of cases of accidents to workmen where an impecunious pursuer chooses to appeal in the hope that the relatively great expense involved will compel his employer to come to terms.

In the case of *Dickie v. Scottish Co-operative Wholesale Society, Limited* ([1903], 14 Sc. L. Rep. 64) the First Division had under consideration the competency of refusing an

appeal from the Sheriff Court for jury trial under sect. 40 of the Act above referred to, and unanimously came to the conclusion that the appeal, however inequitable, must be sustained. Both Divisions of the Court had on previous occasions asserted and exercised a right to refuse an appeal for jury trial on various grounds (*Walker v. Knowles & Sons*, ([1902], 4 F. 403; *Pollock v. Mair* [1901], 3 F. 332; *Gillies v. Scott & Co.* [1903], 5 F. 1118). In this case, however, the motion to refuse the appeal was based solely on the trifling nature of the matter in dispute, and the judgment in view of the previous decisions means no more than that such a ground is not of itself sufficient to enable the Court to refuse trial by jury. The case contains some expressions of judicial opinion which not only show the reluctance with which the Court arrived at this result, but are of importance as bearing on the general question of the propriety of the provision of the Act of 1825. The Lord President said: "I think that in every just interest the present state of the law on this subject is an evil for which a remedy should as soon as possible be sought." Lord Adam agreed, and added: "These appeals for jury trial are becoming so numerous as to amount to a nuisance." Lord M'Laren said: "I agree that a case has been made out for the revision of our procedure in the direction of giving the Court a larger discretion as to the disposal of cases as they arise."

In *Sleigh v. Glasgow and Transvaal Options Limited* ([1904], 41 Sc. L. Rep. 218), the Court of Session took a very narrow view of the definition of "Prospectus" contained in section 30 of the Companies Act 1900. The definition is in these terms: "Prospectus means any prospectus, notice, circular, advertisement, or other invitation offering to the public for subscription or purchase any shares or debentures of a company." The document alleged to be a prospectus

was headed "Glasgow and Transvaal Options Limited." It explained that a Mr. David Fraser, of Pretoria, was now in this country for a short period, and was forming a private limited company to handle about 100 options in the Transvaal. It then proceeded to specify Mr. Fraser's experience and capacity, the amount required to purchase his interest, the proposed capital of the new company, the names of gentlemen who had agreed to become directors, the registered offices of the company, the names of the solicitors, of the bankers, and of the managing director, and various other particulars. It was held proved that at least 60 copies of this document were type-written in the office of the managing director, which was also the registered office of the company, and that at least 40 of these copies were sent out from that office in addition to other copies distributed by individual directors. The action proceeded on the ground that the document contained serious mis-statements, and that as a prospectus it was not in terms of the Act referred to. We have here to deal only with the question whether the document was a prospectus in terms of the Act. The facts of the case, except as bearing on this issue, are of no general interest.

In the opinion of the Lord President, "two main things are required to form a prospectus in terms of the Act—(1) it must be an offer of shares, and (2) it must be an offer to the public, *i. e.*, to the public generally." His Lordship did not think that the document in question fulfilled either of these requirements, but it may at least be argued without any extravagance that it fulfilled both. It was a circular, inas-much as a large number of copies were issued in identical terms, and it contained many particulars regarding the company, including the names and addresses of all the principal office-bearers from whom shares could be obtained. It is true that the word "offer" was not used, but the mere sending of such a document seems to imply both an offer

and an invitation. What other purpose can be suggested for its existence? If then, it was a circular, an offer and an invitation, it was a prospectus provided it was issued to the public. It was of course suggested by the promoters of the company that its only purpose was to facilitate private communication with personal friends, but such procedure in any case is open to great abuse, and in this case it scarcely tallies with admitted facts. We may count every member of the public a friend if he will only give a helping hand to float the company in which we are interested.

It is much to be regretted if from want of precision in the definition of "prospectus" the principal object of the Act of 1900 is to be frustrated, and five years' arduous labours of Parliamentary committees and company experts is to be practically thrown away. It must be admitted, however, that the intention of the framers of the definition might have been more explicitly stated. The English Act of 1844 (7 & 8 Vict., c. 110), which first introduced the principle of incorporation by registration, employed, we think very beneficially, the machinery of provisional registration, and was much more drastic in the matter of the prospectus. It provided (sect. 4) that "before proceeding to make public, whether by way of prospectus, handbill or advertisement, any intention or proposal to form any company for any purpose within the meaning of the Act, . . . it shall be the duty of the promoters of such company" to make certain returns and to lodge among other things "a copy of every prospectus or circular, handbill or advertisement, or other such document at any time addressed to the public *or to the subscribers or others*, relative to the formation or modification of such company." It is true that three years afterwards this provision was repealed on the narrative that "the registration of such prospectuses and advertisements has been found very burdensome to the promoters of such companies" (10 & 11 Vict., c. 78, s. 4), but in lieu of this

repealed portion of the Act of 1844 certain additional particulars as to capital, &c., were by the repealing Act ordered to be included in the return to the registrar, and *it was made penal* to issue before complete registration any prospectus, circular, handbill or advertisement, at variance with the particulars in the return.

In his evidence given before the Select Committee of the Lords in 1898, Mr. Buckley, Q.C. (now Mr. Justice Buckley), advocated a return to the system of Provisional Registration as the most effective method of attaining the objects aimed at by the Bill then before the House of Lords, and which afterwards became the Act of 1900. It is matter of regret that this course was not followed, and we are confirmed in our view by the apparent impotence of the chief provision of the Act as it stands.

R. B.

IRISH CASES.

The "higher kind" of solicitor's lien—the equitable lien on a fund recovered through his exertions, arising under 39 & 40 Vict., c. 44, s. 3—sometimes comes into conflict with the claim of an assignee of the fund *pendente lite*. Such a case, and at first sight one of some little hardship upon the assignee, is *M'Larnon v. Carrickfergus Urban District Council* ([1904], 2 Ir. R. 44). The plaintiff, a building-contractor, had recovered judgment against the Council in an action for "extras" and retention-money. Shortly before this action was commenced, he had assigned for value, by way of security for a debt, a portion of the retention-money to one G., who was a member of the defendant council, and therefore cognizant of the subsequent proceedings in the action. On appeal to a Divisional Court this judgment was set aside, on grounds not material to the present report, and the plaintiff further appealed to the Court of Appeal. Pending this appeal, the parties

entered into a consent, whereby the defendants agreed to pay the plaintiff a portion of the sum claimed, and he to pay them their costs of the action. The plaintiff's solicitor now applied for a charging order on the sum payable to the plaintiff under this consent, and was opposed by the alleged counter-equity of G.

In the first place, clearly the fact that the sum was eventually recovered on consent, and not under an ordinary opposed order, made no difference in the solicitor's rights. Once an action has been begun, the authorities go to show that any money paid by the defendant to the plaintiff in respect of the causes of action therein, is within the meaning of "money recovered or preserved" in the action by the instrumentality of plaintiff's solicitor, and therefore capable of being made available for his costs. But there is equally little doubt that an assignment for value of that fund, before action brought, to a *bona fide* purchaser, will prevail over the lien. It can only prevail, however, if the assignment was really to an outsider, without notice of the solicitor's claim or (apparently) of circumstances under which such claim will arise. In the present case, the Court was of opinion that G. was not in the position of such an independent outside assignee. He was, in a sense, one of the defendants: at the time of the assignment he must have known of the circumstances under which the action arose, and the Court thought that he "knew of and adopted" the proceedings therein. That being so, they held that his assignment should not prevail over the lien of the solicitor, which is based on the principle of salvage. Keeping that principle in view, the case is not strictly one of conflicting equities, inasmuch as the solicitor's right to a charge has a sort of statutory priority over every dealing with the same fund, except one in favour of what we have called an independent outsider.

There are such substantial differences between the Irish and English licensing laws, that Irish decisions are only very indirectly useful for English purposes. Bias on the part of justices, however, is much the same thing on both sides of the Channel, and refusals of licences by justices who are alleged to bring prejudice to the hearing are a matter of some interest at present. In Ireland, charges of prejudice have been more frequently made against justices in the "trade" interest, who grant licences: but the case of *Rex (Findlater) v. Justices of Dublin* ([1904], 2 Ir. R. 75) was an interesting attempt to impugn a refusal of a licence by justices on account of their temperance sympathies. The attempt was unsuccessful, but the facts and the discussion by Palles, C.B., as to the bias which disqualifies, are instructive. The Dublin licensing justices refused Findlater's application for a publican's licence. Some of those who adjudicated were well known as belonging to the temperance party, and the adjudication was attacked for bias on the ground of the presence of these justices. Those who were challenged fell under three classes. Some were subscribers to the funds of the Irish Association for the Prevention of Intemperance, which had among its objects the securing a diminution in the number of licensed houses; to this end it organised opposition to licensing applications, and its solicitor attended and opposed these in the names of local objectors. The second class consisted of a justice who was not a member, but had subscribed to the funds of this Association. The third class contained two justices who were members of the Executive Committee of the Association, which before the Sessions decided as to which licences should be opposed at the Association's expense, and which had directed opposition to be made to this particular application. However, although both these were members of this Committee, one of them was not proved to have been a party to this decision, while the other had

exerted his influence in the Committee against opposing Findlater's application; and the Court were of opinion, as to him, that his determination to vote against the application was arrived at during the hearing at the Sessions.

On this state of facts, the Court held that there was no disqualification upon any of the justices for taking part in the decision upon this application. First, the mere fact that a justice's sympathies tend in a certain direction does not of itself disqualify him from taking part in deciding cases wherein those sympathies may come into play. *Reg. v. Deal Justices* (48 L. T., N. S., 441), where some of the justices who were subscribers to the Society for the Prevention of Cruelty to Animals took part in a conviction for cruelty, is an authority for this proposition. So much for the first class above mentioned. The question as to the others is more difficult. Is a justice disqualified by opposing (actually or constructively), or retaining a solicitor to oppose, a licensing application? The plain man will be inclined to approve of the view expressed by Barton, J., that any justice who can be shown to have taken personal part in doing so, is disqualified. The Chief Baron, however, was not inclined to assent to this proposition without qualification. Undoubtedly, if it were an ordinary case between party and party, such a course would, *ipso facto*, work disqualification; but a licensing application is not a *lis*, not a proceeding *inter partes*—not even in Ireland, where licensing justices are “a Court,” and not in England, where they are an administrative body. There is the decision in *Reg. v. Frazer* (9 Times L. R. 613), which did give an affirmative answer to the question just put; but the Court thought that that decision was not now law since the distinction was drawn by the House of Lords in *Boulter v. Kent Justices* ([1897], A. C. 556), between licensing proceedings and other proceedings before justices.

The decision is pretty certainly right on its facts, but it is one of the cases to which Lord Halsbury's warning applies, against treating a case as an authority for everything which seems to follow from it. Could a justice himself be an objector, and still adjudicate? Could he personally instruct his own solicitor to oppose, and yet adjudicate? And if not, where exactly is the line to be drawn between those cases and the present decision? It is hard to resist the feeling, that but for the accident of the two members of the Executive Committee having been against its resolution to oppose the application, a disqualifying bias should have been held in law to exist; and in fact, the distinction between sympathy and bias is hard to draw.

The Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), provides in effect, by sect. 32, that the Court may grant a bankrupt his certificate of conformity, notwithstanding the non-fulfilment of certain conditions, if it considers that his bankruptcy was due to "misfortune without misconduct." The corresponding provision in the Irish Act of 1872 (35 & 36 Vict., c. 58, s. 56) enacts that the Court may grant the certificate unless it considers that a failure to pay 10s. in the pound is due to "causes for which the bankrupt could not justly be held responsible." Whether any particular case falls under these exemptions is of course a question of judicial discretion; but two recent decisions, in both of which the certificate was refused by the Court of Appeal, are illustrative of the way in which the Court approaches the question.

A., a newspaper proprietor and editor, writes and publishes a libel on B., who sues him, recovers judgment for heavy damages, and has A. adjudicated bankrupt. It may be assumed that A. is solvent save for this judgment-debt. He fails to pay 10s. in the pound. The Court say that

this bankruptcy is *not* due to causes for which A. cannot justly be held responsible, and refuse the certificate. There is very little doubt that a man who publishes a libel does so at his risk, and is in law responsible for any resultant consequences, even bankruptcy. *In re M'Hugh* ([1904], 2 Ir. R. 118).

The other case seems harder. The bankrupt had brought an action against a cycle company for negligence in the construction of his bicycle, whereby he had fallen and sustained injuries. He obtained a verdict, but it was eventually set aside by the Court of Appeal and judgment entered for the defendants. He paid practically all he had (some £150—he was a clerk) to his own solicitors on account of costs; but this still left £250 due them, for which they recovered judgment. The cycle company taxed their costs to over £400. These two debts were practically all he owed, and on these he was adjudicated: he had no assets. The Court held that he also was not entitled to his certificate. It is, no doubt, hard that a man who brings an action, being doubtless advised that he can succeed, should be saddled with a continuing bankruptcy in consequence. But to hold otherwise would remove one of the few checks upon reckless litigation by a pauper plaintiff. *In re Williamson* ([1904], 2 Ir. R. 125).

Boucher v. Clyde Shipping Co. ([1904], 2 Ir. R. 129) is a case in which Admiralty rules and Common-law doctrines are rather curiously involved. It was an action *in personam* brought in respect of personal injuries sustained in a collision at sea. The plaintiff was a pilot in charge of a schooner, which was run down by a steamer owned by the defendants. The jury found that those in charge of the steamer were negligent in not getting out of the

way of the schooner. It was admitted that the schooner, which was being overtaken by the steamer, showed no stern-light as required by Art. 10 of the Statutory Regulations. Sect. 419 (4) of the Merchant Shipping Act 1894 provides that if these regulations are infringed, the *ship* by which they are infringed shall be deemed in fault. If this rule applied to a Common-law action, then it would seem at first sight that it was an ordinary case of contributory negligence, and that the plaintiff was not entitled to recover. The Court held, with some doubt, that the rule did apply to all Courts, and not merely to Admiralty actions. They also held, curiously enough, that the Admiralty rule as to the division of loss where both parties are in fault applied to an action of this rather unusual kind, and that therefore the plaintiff was entitled to half the damages assessed by the jury.

It may be suggested that there is less doubt as to the former of these two points than the latter.

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

The Formation of Companies. By VALE NICOLAS. London: Sweet & Maxwell. 1903.

Mr. Nicolas has added one more to the numerous legal works on Companies, but he has confined it to the Formation of Companies, and to those only which are limited by shares. He commences with the "Incorporation" and continues to "Commencement of Business." He then deals with Promoters and Directors. Perhaps it would have been more logical to have begun with them. Forms of Registration, Precedents of Memorandum and Articles of Association complete the work. The Notes are good and as full as the scheme of the work allows, and we think it will be decidedly useful, not only to lawyers, but also to all business men interested in the formation of companies.

The Yearly Digest of Reported Cases 1903. Edited by G. R. HILL, M.A. London: Butterworth & Co. 1904.

The Annual Digest 1903. By JOHN MEWS. London: Sweet & Maxwell. 1904.

One or other of these Digests is indispensable to any person who wishes to keep his law abreast of the cases. The mere perusal of one set of reports is not sufficient. Mr. Hill now edits the Yearly Digest which Mr. Beal used to edit with such care. Differences will, of course, be found both in the summaries of the cases and in the actual cases in each collection. For instance, we notice that Mr. Hill has included *R. v. Tuffin & Stone* and *R. v. Meade*, which Mr. Mews has not; and without doubt we could find, if we searched, that Mr. Mews has cases that Mr. Hill has not. A very useful part of each digest consists of the list of cases affirmed, reversed, and otherwise noticed. We think that Mr. Hill's notes of cases are rather fuller.

The Encyclopædia of Forms and Precedents. Vol. 5. Companies (Debentures) to Executors. Edited by ARTHUR UNDERHILL, M.A., LL.D., assisted by WILLIAM E. C. BAYNES, M.A., LL.M., and VALE NICOLAS. London: Butterworth & Co. 1904.

This volume appears out of its turn. The subject of Companies, which is to take up 700 pages in the fourth volume, entails such

heavy labour on the two gentlemen to whom it has been entrusted that its issue has been unavoidably delayed. The subject, however, has overflowed into this volume, and the branch of Company law concerning Debentures will be found to take up the first 130 pages of the present volume. It has been entrusted to the very capable hands of Mr. Edward Manson, and an excellent preliminary note of some 30 pages, followed by 64 precedents selected with care, afford a very useful addition to any library, although naturally it cannot compete with the 500 or so precedents in the volume on Debentures of Mr. Palmer's great work. We do not think the aim of this work is to compete with specialists in such subjects, but to supply as much as is likely to be required in the every-day work of lawyers. There are no other equally lengthy subjects, but we may call attention to the headings "Copyright" and "Design." When we say that Messrs. T. E. Scrutton and E. J. Macgillivray are responsible for these subjects, we think we have said enough to show that all has been done that can be done to insure the excellence of the treatment. Other important and useful collections of forms are to be found under "Copyholds," and "Easements," and the notes all through are very well done.

The Art of Cross-Examination. By FRANCIS L. WELLMAN.
London: Macmillan & Co. 1904.

The art of cross-examination is not to be learned from books, but there are many useful hints and suggestions which can be given by an experienced advocate like Mr. Wellman; and a careful perusal of this very readable book will give food for reflection, and possibly suggest improvements in the methods of even very experienced counsel. There are some specimens of cross-examinations in important cases which deserve studying again and again. The English ones are the well-known cross-examination of Jeremiah Smith by Sir Alexander Cockburn in *Palmer's Case*, and of Richard Pigott by Sir Charles Russell. Mr. Wellman remarks that the former cross-examination "might easily be quoted as a very doubtful illustration of the value of this formidable engine," as "it is tolerable certain from other evidence of an unimpeachable kind that Jeremiah Smith was speaking the truth." The difficult question of how to treat experts is dealt with in one of the most interesting chapters, and the illustrations there, supplemented by the cross examination of Dr. —

in the *Carlyle W. Harris Case*, show how a medical witness may sometimes be cross-examined successfully. The story of the *Buchanan Case* is an extraordinary sequel to the *Carlyle W. Harris Case*, and only shows once more that truth is stranger than fiction. A most instructive chapter, especially for young advocates, is that on "Silent Cross-Examination." The accounts of the talents and methods of the leading American advocates are full of interest to an Englishman, particularly the account of Abraham Lincoln's first defence at a murder trial. There are interesting accounts of Rufus Choate, "by far the greatest advocate of the century on this side of the water"; Joseph Choate, the present American Ambassador, "by many thought to be the representative lawyer of the American Bar"; and Judge William Fullerton. Some others are just mentioned of whom we should like to know more, such as James T. Brady, who "has the proud record of having defended fifty men on trial for their lives, and of saving every one of them from the gallows"; and James W. Gerard, who "obtained the greatest number of verdicts against evidence of anyone who ever practised at the New York Bar." We must take leave of what is to our mind a fascinating book, with calling attention to the strongly-expressed view of the Author, in favour of a system resembling the present division of legal practitioners into barristers and solicitors in this country.

The Law of Negligence. By ALFRED SINGTON. London: William Clowes & Sons. 1903.

The law of Negligence seems to have attracted Mr. Sington's interest a good deal by the human interest the cases involve, and he determined to write a short treatise "to which the practitioner might find it convenient to turn, and by which, at the same time, the general student of the laws of his country need not be repelled." He well describes his method of treatment of his subject, by saying, "the general idea has been to examine and discuss somewhat fully the cases and judgments which present points of interest and importance, rather than to classify and exhaustively collect every case." The result is an instructive and very readable book. His examination and comparison of some of the contradictory cases well repay perusal, and are marked by a thorough grasp of principle and much acuteness. As good examples we may invite attention to the comparison of the two cases of *Mangan v. Atterton* and *Clarke v.*

Chambers; the distinction drawn between *Hobbs v. L. S. W. Ry.* and *McMahon v. Field*, and the elaborate examination of the cases of *Victoria Railway Commissioners v. Coultas* and *Dulieu v. White & Sons*. The fact would seem to be that the differences of the judges have often been not on questions of strict law, but on the inferences to be properly drawn from facts, and this is further illustrated by the examination of the two cases of *Hill v. New River Company* and *Sharp v. Powell*. Another discussion which it is profitable to read is that on the respective decisions in *Becher v. G. E. Ry.* and *Meux v. G. E. Ry.*; and Mr. Sington, as we think rightly, doubts the upholding of the decision in the former case, if it should ever be reviewed. We have called our readers' attention to a few points in this carefully thought-out treatise, and it is only space that prevents us from citing many more.

Legal Masterpieces. Edited by VAN VECHTEN VEEDER. 2 Vols. St. Paul, Minn.: Keefe-Davidson Company. 1903.

This is a collection of carefully selected specimens "of the best models of discourse and composition in which the lawyer's work is embodied." A careful study of good models followed by experience is the only method of attaining success in eloquence and composition, and here we have examples of the masterpieces of the greatest English and American lawyers. To read the speeches by themselves would not, however, in many cases give the student the full benefit which can be derived from their study, but each speech is most carefully edited, with a short biographical notice, then a critical sketch of the speaker's career and characteristics, and a statement of the facts of each case to enable the reader to understand its treatment. Many subjects of the first importance are treated, such as questions of International law, illustrated by Lord Mansfield's answer to the Prussian Memorial, and by the respective speeches of Mr. William M. Evarts and Mr. James C. Carter at the Arbitrations of Geneva and Paris. Other arguments and judgments of great importance, and of special interest to readers in this country, as giving information on questions of American Constitutional law with which we are not very familiar, are taken from Alexander Hamilton, Chief Justice Marshall, and Daniel Webster. The burning question of Slavery will be found discussed with great power by Mr. William Evarts, and also by Justice Curtis in the great *Dred Scott* case. In these volumes Benjamin R. Curtis occupies

the unique position of having selections made from both his arguments and his judgments. His best forensic effort is said to have been his defence of President Johnson when impeached. Perhaps the American advocate whose speeches will be read with most interest will be those of Daniel Webster, whose oratorical power is thus described: "An almost unequalled power of statement backed by reasoning at once close and lucid, a real genius for organizing an argument around a fundamental principle, so as to convey a forcible and concentrated impression, a perfect sense of propriety and proportion, a style of expression which placed him among the masters of English speech, and 'the front of Jove himself'—these are the qualities which united to make Webster the greatest orator that this country has produced." We regret that it has been found impossible to give in print a worthy and adequate conception of Rufus Choate, "the greatest forensic orator who has ever appeared at the American Bar," but from the description of his style it would not seem feasible, and we must console ourselves with Curtis, "the most consummate master of pure intellectual style among American lawyers of recent times." It is interesting to see what selections the learned Editor has made from performances of English lawyers. Lord Mansfield is represented by his judgment in *Chamberlain of London v. Evans*, and his Answer to the Prussian Memorial; Erskine by his defences of Lord George Gordon, the Dean of St. Asaph, James Hadfield, and John Stockdale, and his speech for the plaintiff in *Markham v. Fawcett*; Curran by his speech for the plaintiff in *Massy v. Marquis of Headfort*; Brougham by his defence of John Williams; and Cockburn by his speech in the *McNaughton Case*. We should like to have had something of Lord Cairns, who is deservedly praised in the introduction. Last, but not least, we find four judgments of Lord Bowen. It is not difficult to imagine how much labour, knowledge, and ability Mr. Van Vechten Veeder has lavished on this collection; and we welcome it as an edition of permanent value to the records of great jurists and advocates.

The Grant and Validity of British Patents for Inventions. By JAMES ROBERTS, M.A., LL.B. London: John Murray. 1903.

The purpose for which this learned work has been written is well defined in the Preface. It "has been written for, and from the point of view of, inventors." "This work has been undertaken to

enable the inventor to confine his claims to what can be supported, and to avoid errors in drawing his specification." Under the new procedure of the Patents Act 1902, objections on the ground of anticipations will be made by the Comptroller before the grant of the patent, so the inventor will have to consider these questions before the grant is made. It is for the purpose of enabling him to do this thoroughly and effectively that Mr. Roberts has written this work. It is divided into three parts. The first consists of the principles affecting grants, etc., of Patents; the second of abstracts of cases; and the third deals with Statutes and Rules. The first part seems to us to have been carefully worked out with full knowledge and care; but the second part has struck us most, as perhaps being the most valuable part to a practising lawyer. It is entitled abstracts of leading and illustrative cases which are the result of the examination and mutual comparison of all the reputed cases. The abstracts are marked by the unusual amount of pains taken to ascertain the facts; information useful in all cases, but perhaps exceptionally so in Patent cases. "In addition to the usual reports the original specifications have always been used, and the Author has had the advantage of frequent reference to the cases and appendices of the parties." Many of the cases are illustrated with diagrams, and the Author has made full use not only of his legal, but also of his high scientific acquirements. A useful feature is, that after each case is given a note relating to the treatment the decision of the case abstracted has met with in subsequent cases. The book is well got up, its paper and print being excellent—a consideration always of some importance in estimating a law book.

The Law of Banking. By Sir JOHN R. PAGET, Bart., K.C.
London: Butterworth & Co. 1904.

Sir John Paget is a well-known authority on banking, and the work he has just published will be welcome alike to lawyers and the commercial community. What strikes us most in reading it, is the number of unsettled and doubtful points in Banking law which exist, and the thorough manner in which the learned Author sets himself as far as possible to solve them. One point which must often give trouble to bankers, is the effect of a garnishee order on a customer's account. This is treated fully both as regards a current, and a deposit account, and the best practical method of dealing

with the situation is suggested. Another important chapter is the one dealing with "Passbooks." The law seems certainly in an unsatisfactory condition, but we are a little doubtful how far bankers would be able to co-operate to formulate a custom in their own favour establishing the status of the "passbook as a settled account;" and however much the American law may be in advance of ours on this subject, it would have little weight against the opinions of Lord Esher and Lord Justice Mathew which Sir John comments on. Very instructive and exhaustive is the discussion of the difficult and important subject of crossed cheques, and one point even our learned Author seems unable to decide, but states the arguments on each side and leaves it. We refer to the question of what is the effect of a cheque being crossed by an unauthorised person. Another disquisition which is important is that on the effect of the common practice of crossing cheques "a/c payee." Although such a crossing is quite unauthorised, and not recognised by the Bills of Exchange Act, it would hardly be held to be illegal; and it is suggested that at the most "it operates as a memorandum or warning to the collecting banker that he must exercise caution if he collects the cheque for any account other than that indicated." There are numerous other points to the discussion or explanation of which we might refer; but we must conclude our notice of this most thoughtful and, if we may use such a word, thought-producing book, with calling the notice of the readers to the fact that in more than one place Sir John does not agree with Mr. Chalmers, and to advise them if they may require to make up their minds on any doubtful point to consult both books.

The Miners' Guide. By L. A. ATHERLEY-JONES, K.C., M.P., and HUGH H. L. BELLLOT, M.A., B.C.L. London: Methuen, & Co. 1904.

This handy little volume is intended mainly for the use of miners, but it will also prove useful to their employers. It is divided into two parts. The first part consists of an annotated digest of the Coal Mines Regulation Acts 1887-96; the Truck Acts 1831-96; and the Weights and Measures Acts 1878-97. The value of this to the class affected is incontestable. The second part deals generally with the cases regulating the relations of employers and employed under the Employers and Workmen Act 1875; Employers' Liability Act 1880; and the Workmen's Compensation Acts. The most

important principles and points of practice are clearly and accurately stated. Perhaps the most important part of the book is that treating of the legal position of Trades Unions. The principles to be derived from *Allen v. Flood*, and *Quinn v. Leathem*, are clearly given, and the *Taff Vale* case is correctly said to have placed "a Trade Union in precisely the same situation of responsibility for the acts of its agents or servants as any other body of persons, corporate or unincorporate." The tone all through is moderate and impartial; the object is to show what the law is, not what in the opinion of the authors it ought to be.

The English Reports. Vols. 26—37. Chancery, 6—17. London: Stevens & Sons. Edinburgh: William Green & Sons. 1903-4.

These twelve very substantial volumes have all been published within twelve months. When we consider the amount of printed matter on each page, and the fact that there are about 1,200 pages in each volume, and innumerable references and notes, this rapid production reflects great credit on both Editors and Publishers. We have noticed here and there some inaccuracies, such as referring to Gonville and Caius College as "Greville," but on reference to the original report we found that the mistake occurred there. We do not, however, think that the printing has been so carefully done as in the previous volumes, as we have noticed numbers of crooked letters which mar the symmetry of the lines, particularly in 3 Atkyns.

The reports contained in these volumes are Atkyns; Ambler; Barnardiston; Ridgeway; Vesey Senior; Belt's Supplement; Eden; Brown; Cox; Vesey Junior; Vesey Junior Supplement; Vesey and Beames; Cooper; Merivale; Swanston; Wilson; Jacob and Wather; Jacob; Turner and Russell. In all there are over fifty volumes condensed into twelve. This does not, however, represent quite so many cases as would appear at first sight, as there are a great many repetitions, some cases being found in as many as four different reports. The judges whose decisions will probably be found of most importance are Lord Hardwicke, whose decisions monopolise a great part of the first three volumes; Lord Eldon, who, with a short interval, sat from 1801—1823, which is as far as the volumes now before us go; and Sir William Grant, who was Master of the Rolls from 1801—1818. As a rough test of the value of these reports

for practical purposes, we have looked through the Table of Cases cited in 1 Chancery [1903], and find that more than thirty of them are contained in these volumes. It is impossible to make more than a few references to the cases of interest we have come across. There are such leading cases as *Ryall v. Rolle*; *Chesterfield (Earl of) v. Janssen*; *Harding v. Glyn*; *Penn v. Lord Baltimore*; *Garth v. Cotton*; *Ward v. Turner*; *Aleyn v. Belchier*; *Hulme v. Tenant*; *Ackroyd v. Smithson*; *Ashburner v. Macguire*; *Strathmore (Countess of) v. Bowes*; *Fox v. Mackreth*; *Scott v. Tyler*; *Dyer v. Dyer*; *Rees v. Berrington*; *Elibank (Lady) v. Montolieu*; *Ellison v. Ellison*; *Howe v. Earl of Dartmouth*; *Woollam v. Hearn*; *Seton v. Slade*; *Burrowes v. Lock*; *Brice v. Stokes*; *Huguenin v. Baseley*; *Mackreth v. Symmons*, in which also it is interesting to note that Lord Eldon refers to "Mr. Sugden's work (*Law of Vendors and Purchasers*), which seems to me to be a book of considerable merit;" *Ex Parte Pye*. There are numbers of cases of interest apart from their legal importance, such as those connected with the old practice of the Court of Chancery, as to whether depositions should be translated, and numerous applications for Writs *Ne exeat Regno*. The cases connected with Charities are numerous and important, and we find inquiries into the Constitution of Harrow School; Trinity Hall and Katherine College, Cambridge, and a case of special interest in which Horace and Virgil were freely quoted to show how *mores* in the Statutes of a College must be understood. The litigation over the foundation of Downing College, Cambridge, was very great. The case of *Lowther v. Lowther (Lord)* was concerned with a picture by Titian of Mars and Venus, and admitted to be worth £5,000. There are some interesting cases connected with literary copyright and kindred subjects, such as *Gurney v. Longman*, which was a dispute as to the right of publishing Lord Melville's trial; *Lord Byron v. Johnston*, to restrain the publication of poems as Lord Byron's; *Duke of Queensberry v. Shebbeare*, where the printing of Lord Clarendon's History by a person who had got hold of the unpublished MS. was restrained; *Pope v. Curl*, to restrain the publication of Pope's letters; and other cases in connection with Rasselas and Lord Chesterfield's letters to his son. There are cases connected with Privateering; American Loyalists; the Court of Chivalry; the treatment of "Serjeant Counters who have been guilty of malpractices." In *Robinson v. Cumming* is decided the delicate question as to when presents given to a lady

have to be returned. We must conclude with citing what is possibly the highest compliment ever paid to a reporter. In the case of *Woods v. Huntingford*, the Master of the Rolls, after referring to the difficulty of the question for decision, says, "All the cases of any considerable weight have been very judiciously and accurately selected by Mr. Cox in his note upon the case of *Evelyn v. Evelyn*. The Bench, the Bar, and the public in general, are very much obliged to him for his very valuable edition of these very valuable reports. He has there, in as short a note as the subject would admit, put together all the cases, and selected all the material points, and he has there stated the rules respecting this question so accurately and shortly, and so well extracted the principles from all the cases that I would rather refer to his words than use my own." The value of the present edition is considerably increased by the references to the later cases which the learning and research of the Editors has prefixed to the headnotes of the cases.

Second Edition. *The Builders of our Law.* By EDWARD MANSON. London: Horace Cox. 1904.

To the thirty-five sketches which made up the first edition Mr. Manson has now added thirteen more, including Lords Hannen, Selborne, Esher, Bowen, Russell of Killowen, and Watson. The whole forms a very interesting and instructive series. Something less than ten pages is devoted to each judge, and gives a short account of his professional career, then of his judicial, and a judicious selection of the most important cases which he tried or decided. We have read a good deal of it with some care, and have failed to note any except the most trivial slips. Eighteen portraits are given, most of which, so far as we can judge, are very good. The only name left out which might at the present time be added is that of Lord Chelmsford, who is, we think, the only Chancellor omitted. An interesting volume might be produced, giving sketches on similar lines, of the most eminent advocates during the same period, who either never became judges, or from any cause did not become sufficiently eminent to be included in the present series. Perhaps some day Mr. Manson may be inclined to undertake this.

Third Edition. *The Law of Trusts and Trustees.* By A. R. RUDALL and J. W. GREIG, LL.B. London: Jordan & Sons. 1904.

Most of us are, have been, or shall be Trustees, and in consequence have or shall require to consult some reliable authority dealing with our difficulties. For constant and ready reference, we cannot do much better than betake ourselves to what Messrs. Rudall and Greig truly call "a compendious exposition of the Law on the subject." There has been no fresh legislation dealing with Trustees since the date of the last edition, 1898, and we only notice two new Statutes cited, namely, the Colonial Stock Act 1900 and the Larceny Act 1901. A large number of new cases, and a continued demand for the book, are, however, excellent reasons for the issue of this new edition. The body of the work to a large extent consists of the Trustee Act 1893, with very full and well-arranged explanatory notes. The quality of these can be seen by anyone who will turn to sects. 1, 8, 10, 24, 25 and 45, and he will, we think, be surprised at the amount of information contained in the space. For a more exhaustive examination of certain points we are occasionally referred to *Levin*, though we notice the Authors do not always agree with that great authority. The other Acts given with notes are the one rejoicing in the somewhat clumsy title "The Trustee Act 1893 Amendment Act 1894," The Judicial Trustees Act 1896, and the Land Transfer Act 1897, Part I. We may call attention to a little fact in connection with this last Act, that shows how very much up to date the work is, *i. e.*, that a slip has been inserted referring to the case of *In re Williams, Holder v. Williams*, which has been decided since the sheets passed through the press. The Appendices number five. The first gives a Table showing the enactments repealed by and the corresponding sections of the Trustee Act 1893; the second is another Table of the sections of the Trustee Act 1893 and the corresponding sections in the repealed Act; the third is a very valuable list of the Trustee Investments authorized by the Trustee Act 1893, prepared by Mr. John Wheeler Caney; the fourth gives Rules under the Trustee Act 1893, Funds, Rules, and Judicial Trustee Rules. The last Appendix contains some thirty Forms for use under the Trustee Act 1893 and the Judicial Trustees Act. Last, but by no means least, the Index is very complete.

Fourth Edition. *Law of Arbitrations and Awards.* By JOSEPH H. REDMAN. London: Butterworth & Co. 1903.

We are very glad to see another edition of Mr. Redman's well-known work after an interval of six years. So concise and accurate a work requires to be kept up to date. We do not think there have been many important decisions since the last edition, but a good many points of practice have been settled in cases such as *Baring-Gould v. Sharpington*; *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Co.*; and others. We should like to suggest that, following the example of so many other authors, Mr. Redman in his next edition should give the dates of all the cases cited; it is often of great use. There is a number of well-drawn precedents given in the Appendix, with forms, to which perhaps a few more might be added, such as one of an order of discovery, as to the exact form of which we should like information. Besides the precedents given, the learned Author refers us to the second volume of the *Encyclopædia of Forms and Precedents*, where a variety of other forms and precedents settled by him are to be found.

Fifth Edition. *Hall's International Law.* Edited by J. B. ATLAY. Oxford: The Clarendon Press. 1904.

This new edition of the late Mr. W. E. Hall's well-known treatise on International law appears very opportunely. New questions of international relations may present themselves at any moment, and the need of a thoughtful work embodying the latest developments of opinion and practice is apparent. One turns at once to see what is the accepted opinion as to the two questions which have been most recently discussed, namely, the lawfulness of the Japanese attack on Port Arthur without a formal declaration of war, and whether coal is contraband of war. The first is over now, and the only effect of discussing it is to create prejudice. Mr. Hall did not consider that it is necessary to give notice to an enemy before entering upon war, that the contrary opinion now receives but little support, and "to imagine a duty of giving notice to an enemy is both to think incorrectly and to keep open a door for recrimination." The question as to whether coal is contraband is by no means settled; the view of England has been that "the character of coal should be determined by its destination." It is interesting and important to note that in 1884 "Russia took occasion to dissent vigorously from

the inclusion of coal amongst articles contraband of war, and declared that she would categorically refuse her consent to any articles in any treaty, convention or instrument whatever, which would imply its recognition as such." Important events have occurred since the publication of the last edition, and Mr. Atlay is responsible for additions dealing with the Venezuela Arbitration, and later the "pacific" blockade of the same country; the action of France, Germany and Russia, at the close of the Chino-Japanese War; and the Spanish-American War. There are many allusions to the Hague Conference and its various conventions. The subjects in which as a nation we have been most interested lately, have been the Boer War, and the Alaska Boundary Commission. As regards the latter, Mr. Atlay comments on the manner in which the United States chose to construe the term "impartial jurists of repute," and considers it improbable that recourse will again be had to a similar Court. As regards the Boer War, short references are made to the manner in which it was begun; the violations of the Geneva Convention, and abuse of Volunteer Ambulance Corps. Reference of some length is made to the important questions that were discussed* between our Government and the German Government in the case of the *Bundesrath*, in which case it will be noticed that the attitude taken by Lord Salisbury did not agree with Mr. Hall's views. We should like to have had Mr. Atlay's opinion on some of the other points which have been discussed in connection with the war, such as the destruction of the Boer farms, the lawfulness of our moving our troops over the Portuguese territory, and the much-disputed question of our suzerainty over the South African Republic. We could also wish to see some additional light thrown on the burning question of aliens.

Sixth Edition. *A Digest of the Law of Bills of Exchange.* By M. D. CHALMERS. London: Stevens & Sons. 1903.

Mr. Chalmers has the satisfaction of being able to point to the gratifying fact that "nearly all the Colonies and Dependencies have re-enacted the Act for their own territories, with or without small drafting modifications. The result of codifying the law for England has been to secure practical uniformity in the law relating to bills, notes, and cheques throughout the greater part of the Empire." This must be a great satisfaction to the draftsman of the Bills of Exchange Act 1882, and cannot fail to add to the value of his

Digest. The last edition came out in 1896. Some important cases have been decided since, such as *Bechuanaland Exploration Co. v. London Trading Bank*; *Edelstein v. Schuler & Co.*; *Capital & Counties Bank v. Gordon*; *Imperial Bank of Canada v. Bank of Hamilton*; but their number is not so numerous as one might expect; which is probably a sign that a well-drafted Act does much to settle the law. Some fresh illustrations have been added, and the notes have been revised and enlarged. We notice that the learned Editor, in common with some other writers, does not look with much favour on the case of *Sheffield v. London Joint Stock Bank*, which he considers "must be regarded as a finding on the particular facts, and not as laying down any general principle." We wish for the sake of our eyes that all law books were printed as clearly as this one.

Eighth Edition. *Ford on Oaths.* By FREDERICK H. SHORT. London: Stevens & Haynes. 1903.

The present edition is a good deal altered from the last, some unnecessary references to the Judicature Act and Rules being omitted, and the space thus obtained has been given to an addition to the number of forms. By this means it has been rendered of more use to Court officials, whose duty it may be to swear witnesses, etc., and thus its field of usefulness is considerably enlarged, although the greater part of the work is still, as before, devoted to the duties of Commissioners of Oaths.

Eighth Edition. *The Yearly County Court Practice 1904.* 2 vols. By G. PITT-LEWIS, K.C., Sir C. A. WHITE, and A. READ, assisted by A. C. MCBARNET. London: Rutterworth & Co.

This edition of the *Yearly County Court Practice* is as usual divided into two volumes. The first treats on general jurisdiction and the jurisdiction in Admiralty, and contains the County Court Act 1888; the Employers' Liability Act 1880; The Workmen's Compensation Acts; The County Courts Admiralty Jurisdiction Acts; and the Rules and Forms. The second volume deals with the Acts which confer special jurisdiction on the County Courts. The most important new feature this year is the inclusion of the new County Court Rules 1903. Great attention has been paid to these, the notes have been carefully revised, and notes added for the new

Rules. As further aids to master these Rules, both the Explanatory Memorandum officially issued, and Reference Tables are given. We must further specially call attention to an introduction to the new Rules contributed by Judge Woodfall, which will be found of great value, and the part of which dealing with the subject of committal orders is, in view of the unreasonable attacks often made on that power of County Court judges, of exceptional importance. The Employers' Liability and Workmen's Compensation Acts continue to occupy a large space. Mr. Morten Turner is again responsible for the important chapter on Costs and Precedents of Costs.

Ninth Edition. *Alpe's Law of Stamp Duties.* Revised and amplified. By ARTHUR B. CANE. London: Jordan & Sons. 1903.

Alpe's Law of Stamp Duties has for some time held the place of the leading authority on the difficult and technical subject of which it treats, and continues to do so under Mr. Cane's editorship. It combines a wide range of legal and official information, although we are given two cautions as regards the latter. The first is "that except where an official circular is expressly quoted, information of this kind is in no sense authoritative and cannot be guaranteed, though great pains have been taken to secure accuracy." The second is that the practice of the Revenue authorities is, of course, not binding on the Courts. There has not been a great number of cases decided since the last edition, but some of them are important. Among these are two decisions of the House of Lords, namely, *Müller & Co.'s Margarine v. Commissioners*; and *Attorney-General v. Midland Railway Co.* About the reference to the latter there is some confusion, which is unusual in so carefully edited a book. In the preface the reference is given as [1901] App. Ca. 217, which is really the reference to the case of *Müller, etc. v. Commissioners*, which is referred to a little earlier in the preface. In the Table of Cases no reference is given to the Law Reports for the report in the House of Lords, and in the body of the work the erroneous reference in the preface is repeated. The proper reference is [1902] A. C. 171. The size of the book has been increased from crown 8vo to demy 8vo, and though the type of the notes is small it is very clear.

Ninth Edition. *The Secretary's Manual on the Law and Practice of Joint Stock Companies.* By JAMES FITZPATRICK and T. E. HAYDON, M.A. London: Jordan & Sons. 1904.

In this edition the place of Mr. V. de S. Fowke, who was the original co-author, has been taken by Mr. Haydon, but the form of the work has been in no way altered. The book was not intended either for the general public, or for lawyers, though both may derive benefit from a perusal of it. It was intended to serve as a Guide for Secretaries of Companies and their staffs. It therefore combines a large amount of practical information, especially as regards Company Book-keeping, with as much law as a Secretary ought to know. We notice that among the long list of penalties, which are imposed for various acts of omission and commission, there is no reference to the various sections of the Larceny Act 1861. There is a number of useful forms in the body of the work and also some in an Appendix at the end, and at the beginning is a list of all the forms in alphabetical order. We are sure that the work must be of great assistance to every Secretary who possesses it.

Tenth Edition. *Principles of the Common Law.* By JOHN INDERMAUR and CHARLES THWAITES. London: Stevens & Haynes. 1904.

Fifth Edition. *Indermaur and Thwaites' Students' Guide to Real and Personal Property.* By CHARLES THWAITES. London: George Barber. 1904.

Messrs. Indermaur and Thwaites' legal works are well known. They are written primarily and in the main for students, a long succession of whom have profited by them; but some, and the *Principles of the Common Law* is one, have higher aims. It is also intended for the profession, and is a useful book to any one who may consult it. It is of a handy size, well arranged, clear, and, as far as we have been able to test it, accurate. Of course it does not pretend to deal with its subject in an exhaustive manner, but it contains extensive references to other well-known text books, and cites the most important and also the latest decisions.

The *Students' Guide* is simply and solely for students. It contains good advice to students on reading; a good epitome of Real Property Statutes; a collection of test questions; and most important of all, and taking up the greater part of the volume, a digest of questions and answers.

Thirty-sixth Edition. *Stone's Justices' Manual 1904.* By J. R. ROBERTS. London: Butterworth & Co.

We shudder to think what magistrates and their clerks throughout the length and breadth of the land would do without "Stone," but luckily there seems no probability of their ever being deprived of it. The present edition includes some rather important Statutes, such as the Employment of Children Act, the Motor Car Act, and the Poor Prisoners Act. The Editor, in connection with the last-named Act, points out the necessity of revising the prescribed form of words before committal, "explaining to the accused that, having regard to the nature of his defence and to his poverty, the committing Justice may, if desirable in the interests of justice, certify for legal aid." Mr. Roberts considers that the allowances payable to prosecutors and witnesses under the Home Secretary's new order will "in many instances prove unsatisfactory and give rise to much complaint." This we are quite certain of. The question of these allowances has never been treated in a logical and consistent spirit, nor does any Home Secretary ever seem to have made up his mind whether the allowances are for the expenses to which witnesses have been put, or for compensation for loss of time, or partly for the one and partly for the other. We are pleased to have detected one very small slip, because it is a rarity in such a carefully edited work: it is on page 868, and consists in the incorrect addition to Chief Justice Cockburn's name of the title of Lord.

CONTEMPORARY FOREIGN LITERATURE.

Recueil des Conventions et Traités concernant la Propriété Littéraire et Artistique publiés en Français et dans les Langues des Pays Contractants. Berne: Bureau de l'Union Internationale Littéraire et Artistique. 1904.

The title of this compilation sufficiently describes its scope. It contains practically everything necessary to be known about the Berne Convention of 1886, the subsequent conventions of Monte Video and others, and the municipal and international legislation of different States in accordance with the conventions. Most of the official documents are set out at length, so that the book becomes a valuable authority. It may be noticed that Hayti allows

the shortest period (twenty years after death), and Spain the longest (eighty years after death). The book was published too early to allow the inclusion of the bill at the time of writing before Congress for the protection of literary and artistic works sent to the St. Louis Exposition. The value of the compilation is much increased by the inclusion of a short historical sketch of copyright law in the case of the more important nations.

PERIODICALS.

Journal du Droit International Privé. 1904. Nos. I-II. Paris.

This number contains rather a larger number than usual of interesting articles and decisions. M. Naquet is of opinion that the rule *locus regit actum* is facultative rather than imperative. M. Jusserand, the French ambassador at Washington, discusses the Act of Congress of 3 March, 1903, on alien immigration. An anonymous writer shows the great influence of lawyers in framing schemes which will hold water legally in favour of the great financial interests in the United States. The regulations for the Tunis Bar (p. 229) are worth notice. The main result is to assure the preponderance of the French element. Among numerous decisions two are especially interesting. The Supreme Court of California held that the fact that the party to an action bore a foreign title of honour was no evidence of foreign residence (p. 209). The Court of Appeal at Rome held that the law of guarantees has not the effect of making the Vatican and St. Peter's extra-territorial. Accordingly a thief arrested in St. Peter's by a pontifical guard, and handed over by him to the city police, may be prosecuted before the ordinary police tribunal without the authority of the Pope (p. 213).

Deutsche Juristen-Zeitung. 1904. 1 Jan.—15 Mar. Berlin.

Professor Dernburg, of Berlin, deals with the interpretation of wills as a gloss on the maxim of Paulus, *publice expedit suprema hominum iudicia exitum habere*, and its modern analogue in sect. 2084 of the Civil Code (p. 1). An interesting article is that by Professor Gareis, of Munich, on the liability of poets and novelists for insertion in their works of real persons and events (p. 21). The discussion of the question of silence of the vendor as to defects in the thing sold is worth reading in view of English decisions. The Civil Code

seems to adopt the same rule as the English, that such silence gives no ground of action unless the purchaser rely in some degree on the vendor (p. 88). The responsibility of drivers of motor-cars is the subject of a learned essay by Dr. G. Eger (p. 192).

La Giustizia Penale. 1904. 6 Jan.—9 Mar. Rome.

We learn that a bill is before the Chamber of Deputies for abolishing the punishment of *domicilio coatto* or *relegazione*, a punishment no doubt derived from the authority of Roman texts, but which seems to have failed of salutary effect. A case remarkable to an English lawyer is that reported as having been decided in Cassation on 12 Jan., 1904 (p. 261). A certain man was, as English University men would put it, "gated" for an offence, *i. e.*, forbidden to leave his house after 20 o'clock. He did leave it in order to buy bread for his family. It was held that such an act raised a presumption *juris tantum*, and not *juris et de jure*, of his intention to break the law, and that urgent necessity was an answer to the charge.

JAMES WILLIAMS.

SOME WORKS OF REFERENCE.

Debrett's House of Commons and the Judicial Bench 1904. London: Dean & Son.—*Debrett* is so well known that it is perhaps unnecessary for us to notice it in any detail, and when we say that the present edition is in every way up to the high standard of previous ones, that is as much as need be said about it. No changes appear in the arrangement of the present edition, and indeed it would be difficult, if not impossible, to improve on the present form of the work. The contents, both in the Parliamentary and Judicial sections, have been revised down to date of publication, and the many changes which took place in the Ministry at the end of last year, and also in the *personnel* of the House of Commons, have all been carefully noted.

Who's Who, 1904. London: A. & C. BLACK.—*Who's Who* appears this year completely what it professes to be—a biographical annual, the Tables which formerly were part of the work having now been entirely deleted. Despite this deletion the work is assuming somewhat large proportions, the biographical notices now occupying a space of 1,700 pages. The accuracy of the information given shows the great care with which this work has been compiled. The contents include a list of the Royal family, Obituaries, and a very full and complete list of Biographies.

Who's Who Year-Book for 1904. London: A. & C. BLACK.—The *Who's Who Year-Book* makes its first appearance with this issue, and should prove an exceedingly useful little work. It is made up from the Tables which were formerly incorporated in *Who's Who*, and forms a companion volume to that work. It is published at the very moderate price of one shilling, and contains all that one ordinarily wants of the information to be found in the various year-books.

The Englishwoman's Year-Book 1904. London: A. & C. BLACK.—The *Englishwoman's Year Book* "aims at giving some idea of the extent of woman's work and interests, and some guidance to those who want to help their fellow creatures," and without doubt it is well fitted for the achievement of this aim. The contents range over a great variety of subjects, including Education, Employment and Professions, Literature, Philanthropy, and in fact all branches in which women are concerned. The book should prove useful, not only to professional and business women, but also to all who require information relative to the public and social work of women.

Books received, reviews of which have been held over owing to pressure on space:—*Handbook of Legal Correspondents* (Sweet and Maxwell); Jennings and Kindersley's *Land Registration*; Abbott and Holt's *Registration Handbook*; Palmer's *Company Precedents*, Part II; Lely's *Annual Statutes 1903*; Labatt's *Master and Servant*; Moyle's *Imperatoris Justiniani Institutiones*; Selden Society's *Publications*, Vol. 16; Hunt's *Boundaries and Fences*; Foote's *Private International Jurisprudence*; Bray's *Digest of Law of Recovery*; Goudy's *Jhering's Law in Daily Life*; Ball's *Students' Guide to the Bar*; *How to deal with your Taxes*; Martin's *The Position of the Anglican Church in New Zealand*; Gibson and Hart's *Students' Conveyancing*; *English Reports*, Vol. 38.

Other Publications received:—*New York State Library Bulletin*, Nos. 85, 86; *Correspondence on the Panama Question* (Wertheimer, Lea & Co.); *Canadian Law Review*; Sioussat's *English Statutes in Maryland* (John Hopkins Press, Baltimore); *Criminal Law Journal of India*.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Review of Reviews*, *Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*.

THE LAW MAGAZINE AND REVIEW.

No. CCCXXXIII.—AUGUST, 1904.

I.—THE CONGO STATE: A REVIEW OF THE INTERNATIONAL POSITION.

THE official correspondence respecting the administration of the Congo State, now published in the Parliamentary Papers, raises directly between the British Government and that of the Congo State a question which has been and still is the subject of considerable public and unofficial discussion, and which has been treated in great detail in its legal aspects at the hands of eminent legal authorities;¹ and the controversy has reached a stage at which a concise summary of the pros and cons may help to bring the position into clearer focus. The action of

¹ Debate and Resolution of the House of Commons, May 20th, 1903. Hansard, *Parl. Deb.*, Vol. CXXII, 1290.

M. Nys. *Revue de Droit International*, 1903, 315.

M. Joseph Delpach. *Revue Générale de Droit International Public*, 1903, 690.
New Africa. By M. le Chevalier E. Descamps, Member of the Hague Court of Arbitration, Senator and Professor of International Law at Louvain University, 1903.

British Parliamentary Papers, *Africa No. 14 (1903)*, Cd. 1809; *Africa No. 1 (1904)*, Cd. 1933, and *No. 7 (1904)*, Cd. 2097.

The Congo State and the Hague Tribunal. Memorial submitted by the Aborigines Protection Society to the Inter-Parliamentary Union Conference at Vienna, September 1903.

Revue de Droit International, 1904, 234. Address by M. le Chevalier Descamps at the Belgian Royal Academy, May 11th, 1904.

See too *Encycl. Brit.*, Tit. Congo Free State, Vol. XXVII, 200.

the British Government in bringing the matter before the Powers signatory of the Berlin Act of 1885 (Austria, Belgium, Denmark, France, Germany, Italy, Holland, Portugal, Russia, Spain, Sweden and Turkey) was the direct outcome of the resolution of the House of Commons on May 20th, 1903, to that effect: and the first British Note (August 8th, 1903) calls the attention of the Powers to the following charges based on materials furnished by philanthropic societies, commercial bodies, the public press, and despatches from British consuls, which, as the Note points out, have been so repeatedly made, and have received such wide credence, that it is no longer possible to ignore them. They may be summarized thus:—(1) that the object of the Administration is not so much the care and government of the natives as the collection of revenue, and this is pursued by a system of forced labour differing only in name from slavery, the demands being exacted with a strictness which has constantly degenerated into great cruelty, and the armed force of the State being in many cases recruited from the most warlike and savage tribes, who not infrequently terrorized over their own officers and maltreated the natives without regard to discipline or fear of punishment; (2) that the system of administration involves and is accompanied by systematic cruelty and oppression, no attempt at any administration of the natives being made, and the officers of the Government not apparently concerning themselves with such work, but devoting all their energy to the collection of revenue; (3) the system of trade now existing in the State is not in harmony with the provisions of the Berlin Act, Article 1 of which provides that the trade of all countries shall enjoy complete freedom in the Congo basin, and Article 5 that no Power exercising sovereign rights there may grant a monopoly or favour of any kind in matters of trade; that system being that except for a relatively small area on the Lower Congo and small plots actually occupied

by the natives, the whole territory is claimed as the private property either of the State or of holders of land concessions, within which only the State or such concessionaries may trade in the natural produce of the soil, the fruits gathered by the natives being accounted the property of the landowner, and traders there not being enabled to trade with the natives for such produce; (4) while admitting that the State has the right to partition the State lands among *bonâ fide* occupants, and that the natives will as *bonâ fide* occupation progresses lose their rights of roaming over the land and collecting its produce, yet that until unoccupied land is reduced into individual occupation, and so long as the produce can only be collected by the native, the native should be free to dispose of that produce as he pleases. Finally, the Note suggests that the economic grievances should be referred to the Hague Court, and the humanitarian ones to a new conference of the Berlin Act signatories.

The Congo State, in a Note of September 19th, 1903, declares its agreement with the British Government in two fundamental points, namely, that natives ought to be treated with humanity and gradually led into the paths of civilization, and that freedom of commerce in the Conventional basin of the Congo ought to be entirely free; and, while denying the charges of cruelty and oppression incidental to it as unsubstantiated, and ascribing them to jealousy of the prosperity of the State, it justifies its system both under the terms of the Berlin Act and the Common law rights of sovereign States. Firstly, the Berlin Act contains nothing to sanction restrictions of any kind on the exercise of the rights of property, or that gives to one Signatory Power the right of intervention in the internal administration of another. Secondly, as regards the treatment of the natives, compulsory native labour is justifiable as the only contribution which natives can make to the State; the late British Colonial Secretary has declared this system especially applicable to

the natives throughout Africa, and in nearly all parts of Africa natives are taxed: by head tax in the Transvaal, by hut tax in South Rhodesia, Bechuanaland, Basutoland, Uganda and Natal, by hut tax and labour tax in Cape Colony, by poll tax in Orange River Colony, and in German East Africa and in Sierra Leone by hut tax, and taxes in money, kind and labour. The legality of a trade is not affected by its mode of payment so long as it is not excessive, and in the Congo State it represents 40 hours' work a month. The State has, by the admission of British authorities, suppressed the slave trade, excluded alcoholic liquors from its territories, put down cannibalism and inter-tribal warfare, and established good administrative organisation in the way of schools, and it has substituted mechanical modes of transport for the former manual system of native labour. The welfare of the native is provided for by teaching him handicrafts, by safeguarding his individual liberty, and allowing no quasi-slavery contract for his labour; and though he contributes a tax in kind, remuneration is made for his labour, the total of which in 1903 amounted to three million francs. Thirdly, as regards the economic *régime*, *bonâ fide* occupation is undistinguishable from ownership, and the ownership of natives is respected; while the appropriation by the State of vacant and ownerless lands within its territories proceeds on a legal principle universally admitted and adopted in all colonial systems, which does not infringe the principle of freedom of trade, or exclude private trade; but in fact most of the foreign traders have kept to the Lower Congo and thus left the few doing business in Central Congo in a favourable position. The Government has worked its domain lands itself partly because of the almost universal inaction by private traders at the outset, though it left open to private enterprise one quarter of its lands, partly because the State required revenue to meet the heavy expenses of development, and

its powers of raising revenue were restricted to narrow limits by the provisions of the Berlin Act prohibiting import and transit dues in the Congo; and it has in many cases renounced its rights of property in favour of private individuals. The Note concludes by saying that it is contrary to recognised legal ideas to submit to arbitration questions concerning the sovereignty and internal administration of a State, and in the absence of evidence no Court would consent to adjudicate in the matter.

The British Government have now issued a Report prepared by Mr. Casement, British Consul at Boma, after making a journey of two and a-half months in the Upper Congo from June to September, 1903, as evidence of the allegations made in their former note, with a covering despatch dated February 11th last. The substance of the Report, which extends to forty pages of print, and describes the state of things existing in the districts visited, is that, while great material development has taken place in administrative organization and spreading civilisation through the country, the system of forced labour by the natives has produced great abuses in its enforcement; *e.g.*, detention or deportation of defaulting natives or their wives, and mutilations and other severities practised by the black soldiers of the State; while the existing regulations for the remuneration and protection of the natives have been disregarded, and that quite recently, as shown by proclamations of the Government as lately as September, 1903. Both in the Crown lands (*domaine de la couronne*) which the State works industrially itself or by concessionary companies of whose profits it takes a share, and some of which collect the taxes for it, and in the large territorial concessions granted to trading companies, the natives supply the necessary labour for cultivating the products, whether rubber, cocoa, or coffee, and they are bound to collect fixed quotas for the landowners; and in addition or substitution for these,

fixed quotas of food for the supply of the Government and private stations, and other products such as gum copal, or baskets, etc. According to the Government instructions for the working of the *Domaine Privé* (1892), the natives are to be paid not less than the price of the labour necessary for gathering the particular produce, but according to the Consul's report in some places which he visited the remuneration is ridiculously inadequate and inappropriate; e.g., in some cases, thread or shirt buttons for a naked people. The punishments inflicted for failure to supply the fixed quota were flogging (formerly mutilation), summary arrest and deportation to another district, or enrolment in the State force, and villages were punished collectively by crushing fines, for none of which could the Consul discover any sanction in the Penal Code. This had resulted in a large decrease of population in certain places, and emigration to avoid the liability to contributions of rubber, though this was also to be ascribed to sleeping sickness. The system of territorial concessions with "powers of police" was also susceptible of grave abuses towards the natives at the hands of the servants of the concessionary companies, especially the armed "forest guards" stationed in the villages to enforce the delivery of the natives' quotas of produce; and the natives are in the anomalous position of having to work for the companies in order to fulfil a public duty, while they are supposed to be remunerated for it as if it were a commercial transaction between them and the companies, though it is fair to add that they declared that the Company's forest guards were more lenient in their methods than the State soldiers. The Consul found that there was no magistrate resident in the concession he visited, but there was a State officer of inferior military rank who had the duty of supervision over it, but was not in fact independent of the concessionary company. These trading companies controlled a large force of armed men, probably ten thousand in all,

a fact of which the State Government must be cognisant, as all firearms imported into the country must be deposited and registered with the authorities and can only be used by licence. The impression left by the Report as a whole is that the administration is open to criticism, not so much for want of proper laws and regulations as for the evident neglect and disregard of the existing ones for the protection of the natives: while the economic system is liable to cause grave abuses towards the natives and actually productive of them in quite recent cases. With Mr. Casement's Report is also printed a Report of Lord Cromer on a passing visit made by him in January, 1903, to a small portion of Belgian territory on the Upper Nile, in which, after paying a tribute to the outward and material development visible in Government buildings, riverside stations and the like, he calls attention to the fear and want of confidence of the natives towards their governors, and gives it as his impression that "the Government is conducted almost exclusively on commercial principles, and even judged by that standard it would appear that these principles are rather shortsighted."

The rejoinder of the Congo Government (dated March 12th, 1904) substantially adopts "not proven" and "*tu quoque*" as its main arguments. It attempts to discredit the report of Mr. Casement, on the ground that the allegations of cruelties and mutilations rest entirely on native evidence (notoriously untrustworthy) and hearsay, except in one instance of mutilation, in which the real cause was afterwards ascertained to be due to the bite of a boar after "a judicial inquiry conducted under normal conditions, free from outside influences, by the Deputy State Prosecutor," on the evidence of the sufferer himself, who declared that he had lied to the Consul, and in the absence of the natives (forty or more in number), who testified before Mr. Casement and had since run away; that Mr. Casement was exceeding his duties and rights in conducting

private inquiries into cases not affecting British subjects, and that the natives regarded him as a redresser of wrongs and invented stories of mutilation in order to escape the obligation of work for the State. It repeats the contention that forced labour on domanial land is a legitimate form of tax for a Sovereign State, that it is in force in British dominions, notably Rhodesia, and that similar difficulties in its enforcement are met by British Administrations, mentioning Fiji. It, however, admits that in strict principle the idea of remunerating a person for paying his taxes is contrary to ordinary notions of finance, but that this method has been adopted as the easiest way of getting the natives to acquire the habit of work: and it undertakes that full inquiry shall be held into this system and the administration of the Concessionary Companies.

Subsequent correspondence (British Note of April 9th, 1904, Congo Note of May 14th, British Note and answer to Congo State criticisms of Mr. Casement's Report of June 6th), go over the same ground as before, the last proposal of the British Government being that the promised inquiry shall be held by a Commission composed of persons of reputation not connected with the Congo State, before which it would be willing to lay the evidence supporting the allegations of maladministration and cruelty, with full details as to persons, places and dates.

The most striking piece of evidence, however, in support of these allegations is furnished from the side of the Congo Government itself. This is the Report of the Judgment of the Court of Appeal at Boma, dated March 15th, 1904, pronounced on the appeal of a district superintendent of one of the Congo Concessionary Companies (*Société Anversoise Commerciale*) who, together with another subordinate, was convicted of causing the deaths of over one hundred and twenty natives in October 1902 and January—March 1903, in the area worked by the Company, as punishment for not

furnishing the forced labour required by a certain village, and in order to compel villages to collect rubber, which shows that these crimes were committed on expeditions by workmen of the Company and soldiers of the State, commanded by State officers acting under the orders of the accused. The sentence of penal servitude passed by the Court of first instance was reduced from twenty to fifteen (? five) years; the co-operation and connivance of the public authorities being held to be extenuating circumstances to be taken into account in fixing the punishment of the accused, though not justifying him in committing illegal acts. Similar extenuating effects were assigned to "the great difficulties under which he must have laboured as he had to do his duty in the midst of a population entirely hostile to all idea of work, and which only respects the law of force, and knows no other argument than terror . . . it must be recognised that it must be very difficult to act within the law in a country still absolutely barbarous and savage, more especially when the laws to be obeyed in that country are those which govern the most civilised peoples: . . . it is just to bear in mind that, although the acts are in themselves very grave, they lose a part of their gravity when they are considered in connection with the surroundings in which, according to immemorial custom, human life has no value, and pillage, murder and cannibalism were, until the other day, of ordinary occurrence." Consul Nightingale, in a covering report, points out that this Company operates on the Crown lands, and has the power of levying taxes, and that the State holds half its shares and takes three-quarters of its profits: and that in December last similar revenue collecting powers were given by the Executive to another concessionary company in another district. He gives it as his opinion that "if the concessionary companies were abolished and free trade introduced into the Upper Congo, when the natives recovered confidence and understood that they could bring

in and sell their produce to whom they pleased, the Congo State would become the biggest export market for rubber in the world. . . . The State would reap its reward in the trading licences and export duties, and that is all it is fairly entitled to."

These official documents are at any rate evidence of deficiencies in the method of administration in the Congo State, which are not disposed of by the success of the recent libel actions brought on behalf of the State or the companies holding concessions, against persons publishing statements charging them with abuses similar to those alleged by Mr. Casement, the difficulties of private persons proving a case against officials being well known. On the merits they justify other Governments, especially signatories of the Berlin Act, in calling attention to what are *primâ facie* breaches of international contract: and it is only reasonable to expect that the eminent international lawyers who advise the Congo State will no longer insist on the position that these are matters of internal administration which do not admit of foreign criticism or arbitration. On the assumption that the merits justify the action proposed by the British Government, it may now be considered what are the rights governing the question: and these may be said to depend on (a) the international position of the Congo State whether under the Berlin Act or apart from it; (b) whether the land system infringes the prohibition in the Act against monopolies or interference with freedom of trade; (c) whether the system of forced contributions of labour violates the State's undertaking by the Berlin Act to provide for the preservation of the native population and the amelioration of their moral and material condition. The first question naturally largely determines the answers to the others: but with regard to them all only the most salient points can here be referred to, which may have to be considered by the British Government.

With regard to the first question, the Congo Government has described it as an "heresy in International law" to contend that "a State, the independence and sovereignty of which is absolute, should at the same time owe its position to the intervention of foreign Powers;" in other words that the State was a Sovereign before the Berlin Act, was not a creation of that Act, and that it can do all such sovereign acts as it has not precluded itself from doing by the Act. This point is not in terms dealt with in the British Notes which treat the whole question between itself and the Congo State as covered by the Berlin Act. But if the State insists on its rights to enjoy the attributes of a sovereign State as over-ruling the terms of the Berlin Act, and *inter alia* to set up a colonial régime similar to that of other States as MM. Descamps and Nys have learnedly argued, the historical genesis of the State must be considered; and one principal factor in that position is, that prior to the Berlin Conference the Congo State did not exist either under the name or with the political character which it has had since. A private body called the International African Association was founded in 1876* by the King of the Belgians, having officers of various nationalities, and various national Committees, Belgian, German, French, etc., but ultimately becoming Belgian in character owing to the pre-eminent exertions of the King of the Belgians, in order to civilize and open to commerce the centre of Africa; and this afterwards became the International Association of the Congo. As a body of philanthropic and neutral character it was recognized by most of the States afterwards signatories of the Berlin Act as having for some purposes an international existence, and its flag as that of a friendly Government, but each Power stipulated for consular jurisdiction for its subjects. France also secured from it by treaty the right of pre-emption of its territories in the event of its wishing to cede them to any other State; and although

it has been admitted by the French Government that this covenant would not affect the prior rights of Belgium, owing to its national connection with the present State, it is not by any means clear that the Berlin Act signatories would acquiesce in an union of the State with Belgium which went beyond the present personal one of having the same Sovereign. At the time of the Berlin conference the Association, by its then President, Colonel Strauch, a Belgian subject, addressed to Prince Bismarck as President of the Conference a formal intimation of the treaties made by the Association with the signatory Powers, and their recognition of its flag, and an expression of his hope that the Conference would "consider the advent of a Power which sets before itself the exclusive aim of introducing civilization and commerce into the centre of Africa as a further pledge of the fruits which the important work of the Conference would produce." The delegates present all recognised the new State, and finally the Association adhered to the Act of the Conference, and its treaties with the Powers were scheduled in it.¹ From these facts the conclusion has been drawn by M. Delpech² that the Conference was the first recognition of the State by the Powers collectively, and its previous treaties with them singly only then obtained general effect by the sanction of the Act; and that the boundaries of its territories first obtained international recognition on the declaration subsequently made by the King that they were fixed and would be always neutral. After the Conference had closed the Belgian Parliament authorized the King to accept the Sovereignty of the new Congo State, and he notified the Powers that the possessions of the Association would form the Congo Free State, and that at the request of the Association he

¹ Martens: *Récueil de Traité*s, x, 366; the Schedule is headed "Copies of Treaties by which the International Association of the Congo has obtained recognition from the Powers."

² *Op. cit.* above.

had assumed the title of its Sovereign. Both Great Britain and France have since recognised the State as having a political position beyond the limits of the Berlin Act, by treaties of 1894, by which Great Britain leased to the State the Bahr el Ghazal province, and endeavoured to lease from it a strip of territory by the Central African lakes for the purpose of the projected Cape to Cairo Railway ; while France obtained from it a promise not to exercise its rights under that lease, especially with regard to the enclave of Lado. Whether these arrangements survive the Anglo-French agreement of 1899 as to these territories may be doubted : but they are evidence that Great Britain and France recognised the Congo State as capable of political action beyond the boundaries fixed by the formal notice above referred to. Already previously, at the request of Great Britain, the King of the Belgians convened the Brussels Anti-Slavery Conference of 1889, which resulted in the Brussels Act dealing with the obligations of all the African Powers, including the Congo State, with regard to the slave trade and drink traffic in Africa, and at this conference, by the consent of the Berlin Act signatories, the prohibition against any import duties in the Congo basin was removed, and import duties up to ten per cent. were allowed. It is to be noticed that on this occasion¹ the British representative (Lord Vivian) expressed the view that the first status of the Congo State was not intended to be perpetual, but to develop into full freedom of trade and economy with the growth of the State authority over its territories.² The origin of the State is thus unique, in that it is the development of a non-political and philanthropic society into a political body by the goodwill of other States, due not only to the high ideal announced by it of its mission of civilisation into savage territories, but also to the fact

¹ *New Africa*, p. 145.

² Martens : *Recueil de Traité*s, xvi, 29.

that its national complexion is neutral, closely connected with a State which plays no international political rôle owing to the fact of its independence being under the guarantee of its neighbours in Europe. For this reason it seems fair to consider as irrelevant the argument that a State's existence does not depend on recognition (which would make the earlier treaties of the Congo Association as ineffectual for this purpose as the Berlin Act), and to reject the analogies of other States who have won for themselves by their own efforts a place among the nations independently of recognition, such as the United States or the Spanish and Portuguese States of the Americas; and to conclude that in substance if not in form the Berlin Act is the charter of the Congo State's existence. It might be an interesting abstract question whether in International law, if a State has passed into a second stage of development, the conditions attaching to its first stage of State character do not qualify its rights in the second stage, especially when they are, by its own admission, the fundamental object of the Berlin Act, and whether by its failure to observe these conditions it could incur forfeiture of its existence as a State. But it may undoubtedly now be taken for granted that no African State now wishes to raise the question of the sovereignty of the Congo State, or of there being any right or ground for claiming that if its existence is due to the Berlin Act it can be terminated by the signatories of that Act, and the British Government makes this clear so far as it is itself concerned in its Note of April 19th last.¹ In M. Delpech's view, even if the State were the creation of the Act, and had broken its engagements under it, that would be no ground for depriving it of its independence, but only for a rupture of diplomatic relations and the holding of a new conference.

With regard to the question of a revision of the Berlin

¹ *Africa No. 7*, p. 41.

Act and the mutual relations of the parties to it, it is to be remembered that by Article 37 of the Act non-signatory Powers may adhere to it, and by Article 38 adherence carries with it acceptance of all obligations and enjoyment of all rights granted by it. The position of an adhering State was considered at the Conference on the discussion of Article 36, by which the signatories reserved to themselves the power to introduce subsequently and by common agreement such modifications as shall be shown by experience to be useful, and it was declared to be the understanding of the Conference that adhering Powers were not within this Article, but could be invited to take part in such a revision if their co-operation should be thought advantageous (as no doubt it would be in all cases) by the signatories. Further, by Article 12 it was agreed, that in cases of serious disagreement originating on the subject of or in the limits of the territories governed by the Act and placed under the free trade system, arising between signatory or adhering States, recourse should be had to the mediation of one or more friendly Powers, the disputants reserving to themselves the option of resorting to arbitration by joint consent. Thus, although an adhering State like the Congo State would not be bound without its consent by any decisions of the signatories at a new conference which departed from the Berlin Act, that would not preclude those Powers from examining the question whether such a State has satisfied its engagements under the Act.

As regards the second question, M. Delpech is of opinion that, even if the State in a sense at least owes its international existence to recognition by the other Powers, that is not a reason for denying to it the ordinary attributes of sovereign States which are colonising new country, *inter alia* to treat all vacant land as Crown land, and make concessions of it for trading purposes or work it itself industrially for the benefit of the State. It is on this ground that MM.

Nys and Descamps justify the land system of the State as not contravening the condition of "commercial freedom and equality" in the Berlin Act, which had nothing to do with rights of property and public order in the State, but was aimed at preventing any State having territory in the Congo from favouring or monopolising to its subjects the trade there by a *pacte colonial*. There is no doubt that the Berlin Act did not attempt to deal with questions of sovereignty or territorial rights, and as regards the zone lying east of the Congo basin, it was expressly provided that each party accepted the obligations imposed by the Act for itself and its territories only, and disclaimed any wish to extend them to the territory of any independent State except with its consent, the State of Zanzibar being specially instanced in this connection.¹ The Berlin Conference adopted the principle formulated by the high authority of Baron Lambermont for interpreting the covenant for "commercial freedom and equality," viz., that this equality was confined to commerce only, "a free competition in the domain of commerce but the obligations of the local Government did not go further." Such equality only excludes any differential treatment of individuals based on their nationality, but does not exclude differences unconnected with that of nationality. The same learned authorities point to the practice of all nations in settling new lands, to make large concessions of land to individuals and corporations, *e.g.*, by Great Britain in Canada and South Africa and Fiji, by Germany in East Africa, France in French Congo and Algeria, Italy in Erythræa, and Japan in its own islands. In the case of the Congo State this right was of especial value and even a necessity, owing to the financial difficulties imposed on it by the Berlin Act forbidding import and transit duties—a fetter which the experience of a few years found it necessary to remove by allowing an import duty of ten per cent.

¹ Martens: *Recueil de Traité*s (2nd Ser.), x, 417.

M. Descamps points out that the principle of commercial freedom cannot mean that the land can never be appropriated but must always remain open to haphazard enterprise, or that the State cannot trade, or organise a regular system of land tenure, or sell land, or that its right to levy taxes is not only restricted but to a large extent suppressed. Such a contention must be erroneous, because it disregards first, the limits of individual freedom and its relation to the colonial policy of a State, and secondly, the principle that all limitations of the sovereignty of States in this respect are exceptions and must be strictly construed. He admits that at the Conference discussion took place as to whether any taxes or duties should be allowed in the Congo basin, and that the view was expressed that the Conference could forbid all differential rights or privileged trade, and require that the duties levied should not be employed for fiscal purposes beyond the payment of expenses; but as has already been seen it was found necessary to modify the exemption from import duties a few years later. M. Descamps also admits that the attribution of unoccupied property to the State may, if carried to extreme limits, influence the sphere of commerce, but contends that this does not justify the position that such acts are not competent to it: and in his view there is nothing in the Act or out of it to prevent the State from carrying on a trade, even exclusively, which private individuals can do, or from enjoying the right which every landowner has to dispose of the produce of his land: and he even suggests that the State working of certain monopolies would not be within the prohibitions of the Act, for it might be a form of taxation.

It will be noticed that the whole of this argument is based on the theory that the State is owner of lands not held in private ownership within its territories in the same sense that a private individual is. Even on this theory, as pointed out in the British Note, the effect of grants of vast areas of

territory is in practice to create a monopoly of trade in favour of the concession holder if he is able to exclude any other persons from trading with the natives there. Real occupation by such concessionaries, or effective working of such areas, is little more than nominal and partial; and does not amount to actual appropriation of the lands contained in the concessions any more than the occupation of unreclaimed lands by the natives, who before the coming of a white population had the right to wander through them for their own support and for trade. But the theory in this sense, at least at this time of day, seems as obsolete as the theory that by conquest of another State the conquering State becomes the owner of all lands there, even of those held in private ownership. M. Descamps points to the decrees in this sense, vesting the proprietorship of vacant lands in the Crown, of Germany in East Africa, France in the Congo, and Great Britain in Fiji, and the charter to the British East Africa Company of 1888: and appeals to the great authority of Bluntschli in support of the proposition. But at bottom it is a confusion of ideas between the constitutional and legal functions of the Government. A Government has the right and duty to control the allotment and tenure of unoccupied land as much as that of appropriated land, not as a private landowner for his own advantage but as a trustee for the nation; and if it uses its rights to allot unoccupied land for the purpose of vast concessions to private corporations, with extensive "rights of police" over the natives which amount to monopolies of trade within those areas, and even to work similar areas itself, it sets itself up in competition with the ordinary private trader, and can create a situation in which a treaty obligation to maintain "commercial freedom and equality" is rendered entirely ineffectual. If the Berlin Act did not do more than set up an economic *régime*, as opposed to a political one, it at any rate contemplated that the whole basin of the Congo

should be a field for commercial enterprise free from any restrictions, and open to all nations; and if, as is very likely in opening up a new country, a land system is to a great extent inseparable from a trade system, that does not justify adopting a land system which involves a violation of the trade system prescribed by treaty.

The third head is largely covered by the former ones. As regards the trading rights of the natives, M. Descamps urges that there is nothing in the Berlin Act to give the natives priority or even equality with white settlers, and that the development of every uncivilized territory inevitably causes the rights of the aborigines to yield to the new *régime* of organized trade and appropriation of land. The system of compulsory native labour has, as is pointed out above in the Congo Note, been adopted by many States, including Great Britain, which have recognized that it is an occasionally necessary means of education for uncivilized natives, as well as an indispensable means of securing compliance with the duties owed to the State. M. Descamps points out that this is only a form of taxation in kind, and the best form in which the natives can contribute to the expenses of the State is to collect the produce of its domains which have a market value in Europe. Although a compulsory service, it is nevertheless remunerated, and the principle of collective taxation by which the native chiefs are made responsible for the particular quotas of produce due from their districts is not unknown in British colonies, *e. g.*, Fiji. This last point is dealt with by the British Memorandum in answer to the Congo State's rejoinder to Mr. Casement's Report, which shows that this system had been in force for centuries at the time that Great Britain took over the islands, is understood by the natives, and is eminently suited to their needs. It will have been noticed that Lord Lansdowne admits the necessity of the natives contributing by some form of taxation to the requirements of the State, and the advantage

of their being induced to work has always been recognized by the British Government in the development of the British colonies and protectorates in Africa. M. Descamps admits that the principle of compulsory labour is objected to by many persons of colonial experience who prefer a tax of labour or military service, but he regards these as internal colonial questions which each State can settle for itself, and on which other persons of equal colonial experience hold a contrary view to the above. It is at any rate not slavery, as it is a service rendered to the State. To this it seems to be an answer that there may be real danger of its assimilation to slavery if the State takes up the rôle of a private land-owner or trader, or allows the concessionaries of lands to utilise the services of the natives to the State as a means of profit to themselves; and Mr. Casement's Report shows the legal position of the natives who have to work for the concessionaries to be anomalous and unsatisfactory, and that the "police powers" of the concessionaries may be productive of abuses to the natives which the Government cannot in practice make impossible. M. Descamps shows that the State is fully alive to its duty, so far as decrees and regulations can do so, of securing the protection of the natives, and extending civilization gradually over the vast country which it has undertaken to colonise; and another most important factor in judging of the objects of the administration is the history of the financial position of the State given by M. Descamps. This shows that the State is largely indebted to the King and to the Belgian Treasury. The latter has advanced thirty-two million francs to the State, and in return for the right to annex the State, it has for the present renounced the right to demand repayment of principal or interest under the treaty of 1890 and the law of 1901. The King granted it a yearly subsidy of a million francs till 1900. Till 1897 receipts and expenditure balanced exactly. In 1903 the proceeds of the State lands

and tributes and taxes in kind paid by the natives amounted to almost sixteen and a-half million francs, and for exploitation of the domain the wages of the natives amounted to nearly three million francs. The import and export duties of the western part of the conventional Congo basin produced nearly six million francs, but the scale is fixed by agreement between the State, France and Portugal, in 1892 and 1902. The balance of expenditure over receipts (p. 276) has never been more than about two hundred thousand francs. These facts may at any rate be claimed to be evidence that the Government does not raise more money for its purposes than is required by its needs.

It will have been observed that the British Note draws a distinction between the subjects of complaint affecting the treatment of the natives and those dealing with the system of trade, and proposes a new Conference of the Berlin Act signatories to consider the former, and the Hague Court as a tribunal to decide the latter. M. Descamps in his criticism of the British Notes points out that recourse to the Hague Court is only possible by the consent of both parties to an international dispute, and the Congo State is not a party to the Hague Convention, but the Berlin Act governs the position. To this it may be answered that the terms of the Berlin Act (Art. 12) contemplate the very method of settlement (mediation or arbitration) which the Hague Convention has now provided permanently for any nations who differ on a positive juridical question, and the Hague Court can be resorted to by nations who are not parties to the Convention, and in a recent case (that of Venezuela) this took place. This corresponds to the difference between the humanitarian and economic sides of the question; and it is difficult to see how the Congo State or the other Powers can refuse this method of inquiry. Considering the vast territory committed to that State for development, and the infinitesimal proportion of white men to natives (M. Descamps puts it as quite

recently under three thousand white men to a black population estimated variously at from fourteen to thirty millions), the infancy of the State must be a long one; and under these circumstances to earn the goodwill of its neighbours, and their belief in its honesty of purpose in executing the conditions of the Berlin Act in spirit as well as in the letter, should be an essential consideration of its policy. The demand now being made that our Government should claim the right given it by the treaty of 1884 with the Congo Association of consular jurisdiction for British subjects, will otherwise be a request which our Foreign Office will find it hard to refuse: and if this ex-territorial jurisdiction were set up it would be a serious blow to the administration and judiciary of the State in the eyes of the world.

G. G. PHILLIMORE.

II.—THE RIGHT TO RETAIN AN ADVOCATE.

IN England every man has a right to an advocate. Where he is unable through poverty, when charged with crime, or burdened with litigation, to employ an advocate, there is systematic machinery by which the State asserts and secures his right. How far, however, can he insist upon the services of a particular advocate whom he wishes to employ, but who, for any reason whatever, is unwilling to appear for him?

It is a question to which the answer is difficult, how far an advocate is justified in refusing to accept a retainer to appear in Court on behalf of a litigant who requests his services. Of course it is clear that not only has he the right, but there lies upon him the obligation to refuse to accept a retainer in any case in which he has acted in the interests of the opponent, or has been engaged or interested in the subject-matter of the controversy, in such a way as

to prevent his being able to fairly represent the interests of his client. But still the question may arise in a case where he is unwilling to appear upon some ground personal to himself. It seems to be of value to try to ascertain both the rule of practice which should be applied and also the theory which underlies the rule of practice.

The general obligation of acceptance of a retainer is indirectly shewn by the exception declared in Rule 21 as to Retainers. "No Counsel can be required to accept a "retainer where he has previously advised another "party on or in connection with the case."

The latest authoritative pronouncement regarding the rule itself is contained in the resolution of the General Council of the Bar, passed in February 1904, to the following effect:—

"The general rule is that a barrister is bound to accept "any brief in the Courts in which he professes to practise "at a proper professional fee. Special circumstances may, "however, justify his refusal to accept a particular brief."

The effect of this rule would be to prohibit a barrister from refusing to appear, not only in consequence of purely personal considerations of convenience or advantage, but in consequence of his view of the character of the person requesting his services, or his view of the rights of the parties concerned in the controversy, or his view of the law which the Court is asked to administer. In the absence of special circumstances, the only grounds for his refusal would appear to be either that the Court of the litigation is not one in which he professes to practise, or that the fee tendered to him is not, according to the professional standard in that Court for that class of cases, an adequate one. Is this rule the one which obtains in England according to the traditional practice of the Bar, and if so, upon what grounds can it be upheld as a matter of theory and as a matter of practice? Our first conclusion, upon a

careful survey of the usages of the profession, must be that it seems clear that, whatever may be the rule in other civilised States, in England the rule exists and is insistent.

Now the question involved presents an aspect entirely different according to whether the litigation be in the criminal or civil Courts. When a person is charged with a specific criminal offence, being an offence against the State, it is obvious that the Crown could always command the services of any particular advocate practising in the Courts of the realm, and where the Crown commands the services of an advocate no private opinion of the advocate regarding the form or administration of the Government could be allowed to influence his decision upon the tender of a retainer. It would be equally a matter upon which he would be bound to be indifferent, whether or not he regarded with approval the general or the particular law sought to be enforced, or whether or not he believed the circumstances in the particular instance, such as to warrant it being put into operation. And equally whether the offence were *malum prohibitum* or *malum per se*. An advocate, for example, opposed to the Vaccination Acts, might be obliged to prosecute for an infringement of them. In England the advocate would also be bound (within the limits of the rule laid down by the Bar Council) to accept a retainer on behalf of the person charged with the offence. Given the right of a person accused to the services of an advocate, it seems obvious that in theory, at all events, he should not be placed at a disadvantage when the whole power of the Crown is against him. The historic exception of King's Counsel, unless specially licensed to defend, proves the rule. A man of confessedly criminal instincts and ostentatious criminal practices has yet the right to be regarded as innocent of the particular criminal offence charged against him until found guilty after trial. Again, the opinion of the advocate as to the guilt of the person accused ought to have

no weight in his decision. "If the advocate," said Lord Erskine, in defending Thomas Paine in 1792 on a charge of seditious libel, "refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the judge, nay he assumes it before the hour of judgment, and in proportion to his rank and reputation puts the heavy influence of, perhaps a mistaken opinion in the scale against the accused." When appearing for a person charged with a criminal offence, again, it is clear that the advocate is bound to put forward everything which may afford a legal defence to the person accused, even though his own opinion as to the truth of the evidence in support of the defence, or as to the morality of the defence itself, may be adverse to the person accused. For instance, a person accused might admit (and even admit with jactitation) all the facts which go to constitute a particular crime, and yet, pleading "not guilty" to that particular crime, be entitled to the services of an advocate, and even of a particular advocate. Or again, an advocate might be obliged to undertake the defence of a person asserting his right to commit, what his advocate might conscientiously think to be, brawling in Church. Or again, an advocate having the most austere regard for actual existing law might be obliged to put forward the defence of a "passive resister." Personal considerations, or personal opinions, or personal belief, or even personal knowledge, ought never to influence the advocate either in the acceptance of a retainer for a person accused, or in the conduct of the defence. "How can you defend," says Lord Herschell, "a man whom you know to be guilty?" His answer is this: "Even then I do not think it would be a departure from the strict line of moral obligation if the advocate were fairly to exhibit the weak points in the evidence by which it was sought to bring the guilt home to his client, but to take care that he was convicted only according to law." In other words, the

person charged must be proved by constitutional means to be within the mischief of the law which prohibits the precise offence of which he stands charged. The traditional practice in England whereby the defence of an accused person is undertaken at the request of the judge at the trial, is a proof that the defence of a person charged with a criminal offence is in some shape regarded (equally with the prosecution) as a burden which in a proper case it concerns the State to see properly discharged. Here the duty of the advocate is clearly insistent without any condition of remuneration. Another proof of the insistence of the obligation is to be found in the practice of the delivery of "dock briefs" which (in a form dispensing with the intermediation of a solicitor) is merely one method of a person charged with a criminal offence being able to insist upon a particular forensic representation. The Poor Prisoners' Defence Act 1903 is a statutory modification of previously existing remedies of defence. The rule in England may, therefore, be asserted to be that in criminal cases an advocate cannot refuse a retainer.

- It is of value to ascertain the views obtaining in foreign States upon this part of the question. And first as to the practice in the United States of America, because naturally that system of law most nearly approximates to our own. In stating the rule which obtains in the United States of America on this point of retainer, I have had the advantage of a large body of representative opinion. Mr. Le Roy Parker, of Buffalo, regards it as the rule in the United States that there is but one occasion on which an attorney cannot refuse to undertake the advocacy of a cause, and that is when the Court assigns him to defend a person charged with crime.

Professor Noble Gregory, of Iowa (with whom I may associate Mr. Hagerman, the President of the American Bar Association), appears to regard the practice in criminal

cases as follows:—If an advocate be ordered by the Court to defend a person accused he is bound to comply. In any other case, where the refusal of a retainer might lead to a failure of justice, or to an injustice, the advocate in a criminal case is under a professional obligation to accept a retainer without any regard to his own personal opinions, or prejudices, on grounds of conscience or expediency. To cite Mr. Justice Brewer (of the Supreme Court of the United States), who, as a general rule, regards a contract of retainer as being one like any other contract into which an advocate may enter or not as he sees fit, "Sometimes a lawyer owes " it to the profession and to the community to accept a " retainer on behalf of one who is unpopular, in order that " he may do his part in securing justice, and if he shrinks " from that responsibility I think the profession as a rule " would condemn him." Mr. Cephas Brainerd, of New York, is of opinion that though in civil proceedings no lawyer is bound to accept a retainer, which he can refuse for any reason which may seem to him good, there is in criminal cases an obligation to accept a retainer, absolute when the retainer is by assignment of the Court, and otherwise limited to cases where refusal might amount in the special circumstances to an injustice to the accused person. To sum up, where the English rule is obligation to accept except under special circumstances, the American rule is obligation not to refuse where special circumstances exist.

One of the most important of the written statements of the duty of an advocate in this regard is that contained in the oath administered to every advocate in the State of Washington, U.S.A. "That I will never reject from " any consideration personal to myself" (and the rule seems to cover both opinion and interest) "the cause of the " defenceless or oppressed." And with this rule has to be compared that which in the same State obliges the advocate to "counsel and maintain such actions, proceedings, and

“offences only as appear to me legal and just, *except the defence of a person charged with a public offence.*”

The rule regarding obligation to accept retainer in criminal cases which exists in the judicial systems on the Continent, may broadly be taken to accord with that of Italy. It may be taken in substance to be that, save in cases where an advocate has been assigned by the Court, there is no obligation even in criminal cases to accept a retainer.

I am able to append a statement regarding the practice of the Courts in Italy, for which I am indebted to Professor Marchese Alessandro Corsi. “Broadly it may be stated that in Italy (save in the case of the assignment of Counsel under the law of the 19th July, 1880, for The Provision of Legal Assistance to the Poor) there is no obligation in criminal any more than in civil matters upon an advocate to accept a retainer.”

In the case of a person charged with a criminal offence an advocate may be assigned to him by the Judge, and if such advocate neglects to afford the assistance directed he may be punished under the law of the 8th June, 1874, which regulates the duties of advocates.

In France (and so far as I can judge the same rule may be asserted with regard to Spain and Portugal) the obligation to accept a retainer on behalf of an accused person is no higher than in Italy. An advocate assigned is obliged to act, the only difference being that the assignment is made by the Bâtonnier (or president of the order of Advocates at any particular Bar). Apart from assigned advocates, there is no obligation to accept a retainer. I am indebted for this statement of opinion to M. Autran of Marseilles, with whom (as well as M. Labori, of Paris) I have had the privilege of being in communication. It will be noted that the assignment of counsel in France is by the representative of the advocates; in England, by the Court. The real origin

of this difference is historic. In early England advocacy was a service of charity, which became regulated by the State; in early France advocacy was a service of chivalry, which became regulated by the Order.

In Switzerland the practice of the profession, not being governed by federal law and practice, slightly varies in the various cantons, but, broadly speaking, it may be taken that in this question the French rule obtains, and that the advocate, unless assigned, may, even in criminal cases, refuse a retainer. The only rule on the subject may be taken to be such a one as prevails at Zurich (Art. 8 of the Statute of 1898), upon the practice of the profession limiting compulsory retainer in favour of persons entitled to "*Armenrecht*," or, as we should say, "pauper-right."

Dr. Sieveking, of Hamburg, has been good enough to state the practice of the German courts. In criminal as well as civil cases the advocate is at liberty to refuse to appear, save only in cases in which he has been assigned by the Court as counsel. When an advocate is unwilling to accept a retainer he must declare his refusal without delay.

Dr. Stocquart, of Brussels, sums up the rule in Belgium as follows:—" *Aucune loi ni aucun règlement ne peuvent obliger un avocat de plaider une cause contre sa volonté et sa conscience*." I apprehend, of course, that an exception must be made in the case of an assignment of counsel which, almost of necessity, is universally a matter of obligation.

In Sweden it appears that the faculty of lawyers has an entirely private character—any subject without any limitation of qualification may appear as an advocate for any person. It follows that there is no obligation incumbent on any person who acts as advocate to undertake the burden of any case, criminal or civil, unless at his own choice. There seems, however, to be gradually making its way amongst the members of the private faculty an opinion that a certain obligation rests upon them not to refuse their

services, and, curiously enough, the very looseness of the present system may tend to make in the future professional obligations more stringent.

In Russia an advocate is entirely free to accept or refuse a case offered to him, criminal as well as civil. The only exception in criminal cases is when the person accused has counsel allotted to him, and this occurs only when the trial takes place in the Supreme Court, and not when the trial takes place before what one may call Courts of Petty Jurisdiction. The party applying for counsel applies to the Council of Advocates if it exists on the circuit where the trial takes place, and when it does not exist, to the Court itself, and a "sworn barrister" is appointed who is obliged to accept the appointment and attend to the case without a fee. Under sanctions and penalties, he appears, when appointed, to be directly responsible to the State.

So far as I have been able to ascertain, the only State in which the practice on the point of retainer in criminal cases approximates to that of England, is Denmark. Dr. Hindenburg (*Avocat consultant de Ministères Danois*) is of opinion that in criminal cases there is an obligation on an advocate sought to be retained not to refuse the retainer except in exceptional circumstances. The reasons upon which he bases this opinion are precisely those which seem to govern our English practice. He points out as a criterion of distinction, that in the assignment of an advocate in civil cases good cause of action has *prima facie* to be shown, whereas the person charged with crime is assumed always to have a good defence until verdict of guilty.

On the whole, however, the result of this consideration of Continental methods seems to be that, save in the case of assignment of counsel by or on behalf of the Court, there is no obligation, even in a criminal case, upon an advocate to accept a retainer. It may, however, be gathered that there is a substratum of opinion, which is enforced by an extensive

practice of assigning counsel, in favour of preventing such a refusal of a retainer as may endanger the administration of justice. In other words, where the machinery and resources of the State, for the purposes of the State, are brought to bear against an individual citizen, no consideration, either of the character of the accused, or of the merits of the charge, or of the morality of the law, or of the justice of its administration, is allowed to influence the acceptance or rejection by an advocate of the burden of defence. It is, however, very clear that the obligation of accepting a retainer in criminal cases, even apart from assignment by the Court, is not so insistent in any system abroad as in England.

When one turns from the burden of defence in a criminal case to the undertaking by an advocate of a civil cause, the whole question clearly stands on a different footing, and the difference between the practice in England and the practice in foreign countries is very striking. In the consideration of this question, of course, it is assumed that there has been no assignment of counsel under any "*Pro Dco*" procedure. Here the controversy is one between individual citizens, and it may well be that when the controversy is between individual citizens, the advocate is justified in discriminating between causes, so as to refuse to lend his aid to advance a claim which he honestly thinks to be dishonest, or to resist a claim which he honestly determines to be just. But the question is by no means free from difficulty. There seems to be an almost universal practice extending over the whole of the States of the civilised world outside England, based upon classical and mediæval precedent, not only enabling an advocate to act upon an honest prejudice (or fore-judgment) on the merits of the dispute, but even obliging him to do so. And first take the Roman view: "Nor let
" any false shame prevent the advocate from abandoning a
" cause in which he has engaged under an impression that it
" was just when he discovers in the course of the trial that

"it is dishonest." *A fortiori* there was an obligation upon the advocate to refuse to undertake a cause which at the outset he had determined to be dishonest. To use the words of Quintilian: "The advocate will not undertake the defence of everyone, nor will he throw open the harbour of his eloquence as a port of refuge to pirates." Next, take the rule of the "*Noblesse de la Robe*" in France, which may be rendered as follows—that "the advocate was not to undertake just and unjust causes alike without distinction." Again, to cite the view of a well-known French jurist:—"*Certainement l'avocat a le droit et même l'obligation d'abandonner une cause sur la nature de laquelle il reconnaît s'être abusé.*" The rule in Germany in this connection is, that it is the duty of an advocate to refuse his assistance in any case where his advocacy is asked for on behalf of purposes which the law regards as immoral. In the United States of America the rule may be gathered from the oath, referred to above, imposed on every advocate applying for admission to practice in the State of Washington; "That I will counsel and maintain such actions, proceedings and defences only as appear to me legal and just, except the defence of a person charged with a public offence." Clearly, therefore, in cases other than criminal cases, there is, according to American jurisprudence, an obligation for an advocate to institute a preliminary inquiry into the legality and justice of the subject-matter of the claim or defence in which he is sought to be retained.

So much for the affirmative side of the assertion of the obligation of the advocate to institute a preliminary inquiry. It may also be stated that broadly nowhere in the world, save in England, is there held to be any obligation in a civil case upon the advocate to accept a retainer when he is unwilling for any reason to appear. Whatever may be the rule in America regarding criminal cases, it is clear that in civil cases the advocate is absolutely free to accept

or reject a retainer. I have pointed out that, in the words of Mr. Justice Brewer in the United States of America, "like any other contract he may enter into it or not as he sees fit." In a little book on *Legal Ethics*, Dr. Wargrave, of Chicago, says that the idea that a lawyer may not refuse a retainer is one of the old mediæval notions, but that if it ever was a rule it has long been abrogated, at least as to civil cases, and that generally the relation of a lawyer to the client is one of employment which he may refuse for any reason, or for no reason. In every country in Europe, Italy and Spain, France and Belgium, Switzerland and Germany, Sweden, Denmark, Russia, the rule is clear that in civil cases, other than pauper cases, there is no obligation whatever on the advocate to accept a retainer. And yet, to quote the words of Lord Herschell, "Many a wrong would go unredressed, and many a man with a just cause would suffer if the assistance of an advocate were never rendered until he was first assured that his client had the law on his side."

What is the rule in England? The only statute which directly relates to the rights and duties of an advocate is that of Edward I (1275). The punishment provided by that statute appears, however, to be directed to the advocate who, should in the conduct of a case before the King's Court be guilty of "any manner of deceit or collusion," and does not appear to be directed to the selection of causes in which the advocate may or may not appear. Again, the *Mirroir des justices* (temp. Edward II) provides that the advocate "be charged by oath that he will not maintain nor defend what is wrong or false to his knowledge," but this provision again appears to refer to the forensic conduct of the cause. But then the whole practice connected with the office of advocate in England is based upon traditional observance, and, taking this as a guide, it is clear that there is an obligation in the absence of special circumstances,

even in a civil suit, for an advocate to accept a retainer, although he may have reasons of personal expediency, or even grounds of conscience, to induce him to refuse to appear. The fact is that the conception of the office of an advocate in England differs from that of an advocate in every other country in the world. Elsewhere he must conduct the proceedings in substance according to the wishes of the client. Here he may conduct the proceedings according to the recognised standard of forensic practice without fear of personal consequences. Consider the fundamental basis of the office of advocate in England, and the general principles of universal application which afford him guidance in that office. The advocate is not the servant of his client. His employment is not a matter of contract. It is not the relation of principal and agent. The advocate can enforce no agreement for remuneration, and he is under no liability in respect of incompetence or negligence. Having been retained, and having accepted the retainer, he thenceforward acts entirely in the conduct of the case upon his own judgment and discretion, uncontrolled by his client, and, within the limits of matters connected with the actual conduct of the case, the whole management of the cause is left to the counsel. He has no right to identify himself with his client, or even to express any opinion personal to himself. He is the forensic representative of the client without being, in any sense, his agent. He is, perhaps, rather to be regarded as that part of the machinery for the administration of justice which brings before the Court all that ought to be brought before the Court on the part of the client, in order to secure a right decision. He has complete authority over the suit, the mode of conducting it, and all that is incident to it, withdrawing the record, withdrawing a juror, calling no witnesses, or calling such as in his discretion ought to be called.

This being the view in England regarding the functions

of an advocate, how far is he justified in holding a preliminary inquiry, upon the answer to which depends whether or not he will accept the retainer offered to him. In such an inquiry the following considerations might have weight : (a) his view of the character of the person requiring his services, and (b) his view of the rights of the parties concerned in the particular controversy. I do not think that the rule of conduct to be applied by the advocate in the first set of circumstances can be better summed up than in an address delivered in November, 1903, by Thomas H. Holland, of the Bar of the United States, to the law students of Albany, N.Y., upon " Legal Ethics " :—

" Bad and vicious men have rights of person and of property no less than exemplary men But there is no edict of confiscation applicable to bad men. Among the vagaries of legislature no law has yet been proposed that forbids bad men to go into Court, or to employ lawyers to appear in Court for them ; as no man is wholly good it follows that all men are more or less bad, and the exclusion of bad men from the privilege of the Courts would either exclude all citizens or would call for an impracticable classification based upon degrees of badness or goodness. There is no reason why a lawyer should not accept a retainer from the worst or most disreputable of men, unless the retainer puts the lawyer under control of the client, or compels him to personate the client, or to execute the orders that the vice of the client invents."

Regarding the view of the advocate in England, both as to the character of the client and the rights of the parties concerned in the particular controversy, it must be remembered that he has the advantage of a preliminary investigation on the part of the solicitor instructing him, who has the absolute right in the first instance of refusing a retainer. Those instructions warrant him in assuming that whatever may be the rights of the quarrel, his client is honestly asserting (however much he may be mistaken) what he regards as his right in the controversy. The solicitor is an officer of the Court. By his instructions to the advocate he warrants that there is a case which *prima facie* ought to be presented to the Court. In the absence of the belief of the advocate that in accepting a retainer he

may be lending himself to the assertion of a fraud (which would of necessity be a "special circumstance"), in England his adverse view of the legality or justice of the cause of his client will not permit an advocate to refuse a retainer. The full extent of the right and obligation of the advocate to decide upon the acceptance or the rejection of the cause in which he appears cannot at any rate be put higher than such an obligation as exists under the oath of the State of Maine, that he will not wittingly or willingly promote or sue any false, groundless, or unlawful suit, nor give aid or consent to the same. When the advocate has once embarked on the conduct of the case he may find in the course of it that it is fraudulent or immoral. Then the rule is clear. As in the old Roman rule, "Nor let any false shame prevent him from abandoning a cause in which he has engaged under an impression that it was just, when he discovers in the course of the trial that it is dishonest."

There are, however, still cases which can be brought into neither the criminal nor the civil class of cases, and yet in which the services of an advocate may be requisitioned. It is in regard to what may be termed "administrative" cases that the question which we have set out to consider has most recently arisen. The actual problem broadly stated, is this:—Certain advocates, who are known politicians, have by their public utterances identified themselves with what is known as the "Temperance Movement," or represent in Parliament constituencies which have declared in its favour. Their policy goes the length of condemning the system by which intoxicants are allowed to be sold to the public by selected persons holding licences granted for that purpose by administrative authorities. In effect they regard the traffic as immoral, every grant of a licence as a State error, and every application for a licence as an attempt to bring about a public mischief. They ignore such criteria as the technical legality of the traffic, the discretion to be

exercised in the grant of the licence, and the personal fitness of the applicant. They, therefore, may be regarded as conscientiously objecting to the administration of a system of law which they regard as reprehensible.

This difficulty, however, arises whenever the advocate has a conscientious objection to the law as it stands, or to the method of its administration. Suppose him to have a conscientious objection to any decree of divorce. Given an applicant worthy of the relief to which the law entitles him, has the advocate the right to refuse to appear in support of an application for something which may, and ought to be granted by the law of which he disapproves? In the case of the administration of the licensing law, the unwillingness of a particular advocate may become of practical importance to the particular client. The law may be complicated, the facts may be so involved as to need expert statement, the stake at issue may be large, the field of expert assistance may, in a particular locality, be small, and so the refusal of a retainer may result in a substantial injustice. It may be said that there is no refusal of forensic aid to the defenceless as in a criminal case. It may be said that there is no prejudging of the rights of the particular controversy as in ordinary civil legislation, because the tribunal itself is a tribunal of discretion. On the whole it seems that the stringent rule by which in England a retainer cannot be refused ought, in the absence of special circumstances, to be enforced. The law exists; if the application be warranted by the particular facts the applicant is entitled to exercise of a judicial discretion, the exercise of that judicial discretion is wont to be assisted by forensic statement, it is a case in which by the law of England the applicant is entitled to an advocate, an advocate warrants nothing, implies nothing, by his representation, save that there is an application to be judicially considered. He is not the servant or the agent of the applicant. If the advocate has a private opinion upon

the merits of the application he has no right to express it. He has merely a professional qualification to represent, and has no right to refuse to undertake on behalf of a client that burden which the State has permitted him as a member of a privileged order to assume.

But the matter does not rest even there. The objections to accept a retainer may be grouped under the head of personal detriment or under the head of public disadvantage. Now there may be, on the part of those who favour any particular social crusade, a liability to misconstrue the action of an advocate who appears to be acting the part of a champion in a cause which his private conscience or his public action condemns. But every advocate runs this risk with the unthinking even in common-place cases of everyday practice. He may appear to condone crime by seeking to minimise the fault of the criminal. So far as any public disadvantage is concerned, there is no danger under the present rule that a tribunal of discretion will be influenced by an apparent warranty derived from a particular forensic representation. Supposing, however, the rule were abrogated, these very evils would arise. In every application the question would naturally arise, "Who is the advocate "who vouches for its substance or its propriety?" No one can under any system ignore the general value of reputable forensic representation, but it cannot be well that an advocate should find himself as a matter of automatic action lending a personal reputation to, and in the process acquiring one from, his clients and his causes. The rule is clear, the practice is in accord, the theory on which it is based is reasonable, the advantages of its application are obvious, and the dangers of deviation from the rule and practice show conclusively the necessity for its strict observance.

I have to express my obligations to the following jurists, in addition to those to whom specific reference has been

already made, who have been kind enough to assure me regarding the practice in foreign States: Judge M'Clain, of the Supreme Court of Iowa; Dr. Gregory, of Chicago, President of the Bar of Illinois; Ex-Senator Vilas, of Wisconsin; Dr. Kühn, of Zurich; and Drs. Hedlund and Mannheimer, of Göteborg.

EDWD. S. COX-SINCLAIR.

III.—THE LEGAL TIE WITH THE COLONIES.

OUR colonial policy has undergone many changes since we first began seriously to consider the subject; and the scant interest formerly displayed is probably to be attributed to the old idea that colonies simply belonged to the King, and hardly formed integral parts of the Empire. It was not until the accession of Charles II that a committee of the Privy Council was charged with colonial affairs—an arrangement which lasted but a short time; for six months later a new body, distinct from the Privy Council, and called the "Council of Foreign Plantations" was in its place established; whilst three years later the latter was joined to the "Council of Trade," which had also been created in the same reign. Its designation then became the "Council of Trade and Plantations." Nevertheless in 1677 its commission was revoked, and its papers handed over to the Privy Council, once again, however, to be revived in 1697.

The precursor of the Colonial, as of other, Secretaries of State, was the King's Secretary, an office first heard of under Henry III. Before that period no doubt the work had been entrusted to the Chancellor. But as about this time his judicial duties began to assume imposing proportions, the work had necessarily to be done by others. Hence arose the Royal Secretaryship which, under

Henry VIII, grew into increased importance. In 1539 an additional one was appointed: and under Elizabeth the Secretaries ceased to belong to the royal household. From 1708 to 1745 there was a third for Scotland, and in 1768 the first Secretary of State for the Colonies was appointed, though the "Council of Trade and Plantations" still flourished. In 1782, however, the loss of the American colonies reduced the office to a sinecure, and it was abolished, the Council also soon sharing its fate. But the king was at the same time empowered to delegate colonial affairs to a committee of the Privy Council, and subsequently an Order in Council directed colonial governors to render their returns to a committee of the Council called the "Board of Trade"—a body which has long since ceased to have any direct connection with colonial affairs.

Meanwhile, and except as regards the transitional arrangements already alluded to, the two Secretaries of State divided their business into a northern and a southern department. The one dealt with the northern countries of Europe, and the other with the southern, which also included Ireland and home affairs. In 1782 the work was readjusted, and henceforward the northern department dealt solely with foreign affairs, becoming in effect the modern Foreign Office; whilst the southern became the modern Home Office with Irish and colonial affairs added, the Colonial Secretaryship being for the time abolished. But this plan proved no more stable than its predecessors: and in 1801 colonial affairs were handed over to the Secretary of State for War, an arrangement which lasted until the Crimean war demonstrated its futility.

With the loss of the American colonies closed the first period of our colonial history. Afterwards the home government evinced more interest generally in colonial affairs; being inclined, however, to meddle unduly with details. But eventually the principle of retaining colonies by letting

them govern themselves became the leading characteristic of the new policy. In 1785 New Brunswick was granted representative institutions, and in 1832 Newfoundland was similarly treated. Whilst the American colonies still formed part of the British dominions, transportation to the plantations was found to be a convenient method of disposing of criminals; and so in subsequent times some fresh territory had to be utilised for the purpose. Thus New South Wales and afterwards Van Dieman's Land became penal settlements; and although representative institutions could not at once be accorded, legislative councils, nominated by the Crown, were granted in 1820, the non-penal settlements of South Australia and New Zealand subsequently obtaining the same privilege. On the other hand, Canada is classed under the head of colonies acquired by conquest or cession, which at once came under the legislative authority of the Crown. Ceded to England in 1763, a Canadian Council was appointed ten years later; and after a further lapse of twenty years, it was divided into two provinces, each with representative institutions—a plan which solved in a manner the difficult problem of finding a form of government congenial to both populations.

But, generally speaking, the administration of those colonies which possessed representative institutions was in an unsatisfactory condition until the commencement of Queen Victoria's reign. State responsibility rested entirely on the Governor, who, although assisted by an executive council, was in effect answerable only to the Crown. Complaints under this system were numerous; but a remedy was hard to find. Eventually it was reserved for Lord Melbourne's ministry, in office when Queen Victoria ascended the throne, to rectify matters. The remedy applied was the adaptation of the principles which govern the English constitution to colonial polity, and the gradual introduction of self-government. In 1838 Lord Durham, on

proceeding to Canada as Governor-General, was specially commissioned to inquire into the system; and a year later an elaborate report, recommending responsible government for Canada, was the outcome. The Canadas were then united, and in 1841 the principles of Lord Durham's report were adopted. At first the new system was little understood; but in 1847 the same plan was adopted as regards the maritime colonies. In future, then, the Governor chose his advisers from the party in power; and thus, whilst the Governor was, like the King, placed above parties, the executive and the legislature were brought into harmony.

It was only natural that at the start a good deal of Colonial Office supervision was necessary. But, as the colonies concerned grew accustomed to their new responsibilities, interference ceased as regards local matters. In furtherance, also, of this great scheme, an Imperial Act in 1850 gave the existing Australian legislatures the power of altering their constitutions, with the saving clause that before such constitutional changes could take effect they should in all cases have received the sanction of the Crown.

* At first these colonies had only single charters; but soon it was found necessary to have two. In 1865 yet another step was taken towards the accomplishment of the same end, by the enacting that local legislatures should have full powers relating to their own constitutions, and the authority and procedure of their legislative bodies.

Obviously the methods by which each of our colonies is governed cannot be uniform; the general importance and height of civilisation to which each has attained being important factors in determining the degree of self-government each shall possess. Thus Canada, the Australasian colonies, and Cape Colony, possess representative assemblies which are at once legislative and, to a certain extent, constituent bodies.

The sources from which the royal power over the colonies

is derived are Orders in Council, by which the will of the Crown is expressed in colonies acquired by conquest or cession: the British Settlements Act of 1887, which empowers the Crown to establish such laws and institutions, and to make such regulations as regards procedure and the administration of justice, as may be necessary in the case of new colonies which had no pre-existing civil governments: the Act of 1867, which gave the Crown similar powers over the Straits Settlements on their separation from India: local Acts passed by colonies, which possess elected legislative bodies: and those which place the nomination of their legislatures in the hands of the Crown, as Honduras did when she recast her constitution.

The different colonies themselves may be broadly divided into those which have, and those which have not, responsible governments—in other words, those in which the principal government departments are administered by politicians who are answerable both to the Crown and to the elected legislature, the Governor, who appoints them, being still nominated by the Crown. There are twelve who possess elective assemblies and responsible governments. These are the Dominion of Canada, Newfoundland, Cape Colony, Natal, the Australian Commonwealth, the six Australian States, and New Zealand. The constitutions of these great colonies are, as far as possible, copies of our own; and they are, except as regards their subordination to the Imperial Parliament, sovereign bodies.

Canada is in a somewhat different position to any of the others. It is a federal union, constituted by the British North America Act of 1867, which was passed with the consent of delegates from the various colonies concerned. It consists of one central and eight provincial governments, each of which possesses a separate legislative assembly; which has the power of altering its own constitutions, except in respect of the office of Governor, who is the representa-

tive of the Crown in each province, as well as in the Dominion. These powers, however, are not intended to be exercised as if by delegation from, or as if the provincial legislature were acting as an agent for the higher assembly; the powers bestowed having, within their sphere, the same force as Acts of the Imperial or Dominion Parliaments. When controversies arise between the two, or when there is doubt as to legislative competency, the Supreme Court of Canada, subject of course to Privy Council Appeal, interprets the constitution according to the British North America Act: and though in theory this should rarely happen, numerous cases have nevertheless been brought before the Courts—a result which shows that the Courts are the real interpreters of the constitution.

The Australian Commonwealth stands on a different footing. It is in effect a large self-governing colony, created by Imperial Enactment; and under it the position of the various component colonies remains much the same. The Governors are still appointed by, and Bills passed by the local parliaments still require the assent of, the Crown. The executive power of the Commonwealth is vested in the King, and is exercisable by the Governor-General with the advice of the Federal Executive Council; whilst the legislative power is vested in the Federal Parliament, which consists of the King, a Senate, and a House of Representatives. In some ways there is a material difference between the Australian and Canadian constitutions. When the federation of Canada took place, the Crown relinquished the power of appointing the Governors of the federated colonies, leaving such matters to the Governor-General, assisted by his Ministry, though it retained the power of appointing the Governor. In the Australian case, the Governor-General is of course appointed by the Crown. But, in addition, the governors of the different States are also appointed in the same manner. Again, the Canadian

Constitution can only be amended by an Imperial Act, whilst the Australian Commonwealth can be amended by one of its own.

The Privy Council remains the ultimate Court of Appeal in judicial matters, when the interests of other parts of the empire are also affected, when the King grants leave to appeal in matters not involving the interpretation of the constitution, or when litigants who appeal from the Colonial Supreme Courts choose to submit appeals to the Privy Council rather than to the Federal High Court. Like the United States Supreme Court, the federal tribunal must necessarily be the ultimate guardian of the constitution; and consequently it will, from time to time, have to decide on the validity of Commonwealth Acts. Its jurisdiction is twofold, original and appellate. It is original on all matters arising under treaty; affecting consuls or the representatives of other countries; when the Crown or someone on its behalf is a party; between States or residents of different States; and in cases where a writ of mandamus, prohibition or injunction, is sought for against an officer of the Commonwealth. The judges are appointed by the Governor-General in council, and are not removable except by the same authority, acting on an address from both Houses of Parliament in the same Session, praying for such removal on grounds of proved misbehaviour or incapacity.

As regards the second category of colonies, of those which do not possess responsible Governments. There are some which have no legislatures at all, like Gibraltar, Labuan, St. Helena, North and South Nigeria, in which cases both legislative and executive functions are vested in the Governor alone. Bechuanaland, Basutoland, and Zululand are also in a somewhat similar position. Again, there are colonies with a nominated council, the Governor possessing a legislative and executive council, the members

of which are nominated by the Crown or by him as representing it. These include British Nova Scotia, New Guinea, Ceylon, Falkland Isles, Fiji, Gambia, the Gold Coast, Honduras, Grenada, Hongkong, Lagos, Orange River Colony, St. Lucia, St. Vincent, Seychelles, Sierra Leone, Trinidad and Tobago, and the Transvaal. The Bahamas, Barbadoes and Bermuda, are examples of colonies which have two chambers, one nominated by the Crown and the other elected by the people; whilst British Guinea, Jamaica, Mauritius and Malta, possess assemblies which are partly nominated and partly elected.

In the case of the new South African Colonies, letters patent on 21st June, 1902, constituted the Government of the Transvaal and provided for an executive and a legislative council, the members of whom were to be appointed by the Crown. Similarly in the case of the Orange River Colony, letters patent on 24th June 1902, provided that there should be a Governor and Commander-in-Chief and a Lieutenant-Governor in the colony; and an executive council, consisting of the Governor and such persons, not less than two, as might be directed by Royal instructions. Subsequent legislation in both cases has, therefore, been by ordinance, the Crown, of course, reserving to itself the power of disallowing these.

Though colonies acquired by conquest or cession fall at once under the legislative power of the Crown in Council, the latter cannot legislate contrary to the principles of English law; and Parliament can, in addition, step in and make provisions for their Government. But when the exercise of subordinate legislation has once been immediately and irrevocably granted to a colony by the Crown, the legislative power of the latter by Orders in Council is, unless expressly reserved, at an end.

The relations generally between the Crown and the colonies are governed by the rules that the Imperial Par-

liament can make laws binding on any part of the British dominions ; and that a colonial act, if in any way repugnant to an Imperial one, is inoperative. But no colonial act is void merely because it is repugnant to the Common or unwritten law : it only becomes so when it directly contravenes some specific act, order, or regulation ; otherwise the Common law, as the birthright of every Englishman, applies generally to all colonies—it even still runs in the United States—except in so far as the tinkering of ignorant legislators has detracted from its logical consistency.

The main difference between the Imperial and a Colonial Parliament is that the former is a sovereign body, and that consequently it can pass, repeal, or amend any law, and can, in fact, do whatsoever it pleases. No new law, therefore, which has been passed by Parliament—that is to say, by Crown, Lords, and Commons—can be unconstitutional. But in the case of non-sovereign bodies, it is very different. In spite of their seeming independence, they are only empowered to make laws within the limits prescribed by their constitutions. In fact, the Parliament of a dependency can in no case be really a sovereign body ; and even some independent nations are in this respect in a similar position. The French Parliament, for instance, is not a sovereign body ; and it is supreme only in so far as it avoids collision with the articles of the constitution, which it has no ordinary powers to tamper with.

There are several ways by which colonial legislation may be checked. The Governor may refuse his consent. Moreover, even after it has been given, the Royal Assent may still be withheld in the case of Acts passed with suspending clauses—that is to say, Acts which, in spite of the Governor's assent, are not to come into force until His Majesty has specially confirmed them. Again, there are Bills which the Governor, instead of himself assenting to, reserves for confirmation by the Sovereign. Finally, the

Crown retains the power of disallowing any law, even if it has received the Governor's assent; and such a law ceases, of course, to have any effect from the day it has been so disallowed. Consequently, though the Governor, as representative of the Crown, gives the Royal Assent, his action is not conclusive, since the Crown in effect possesses a second veto.

The status and powers of a colonial Governor differ materially from those of the rulers of India and Ireland—which of course are not colonies—who in each case possess all the attributes of the Sovereign whom they directly represent. A Governor is appointed by commission; letters patent define his powers, as well as constitute his office; and his instructions go into details. It is now an established rule that the Governor of a colony does not possess general sovereign powers. On the other hand, he can in no case be held personally responsible for any act which, within his legal authority, he performs as an act of State. It has also been decided that it is for the Courts to determine what constitutes such an act. But an action may lie against a Governor for any act, other than an act of State within his authority, in one of his own Courts. Moreover, if a Governor, who possesses merely a limited authority from the Crown, assumes a sovereign power beyond the limits so delegated to him, his proceedings are totally void; and the Courts of his colony have no power to give them legal effect. He cannot, however, be held personally liable for contracts made in his official capacity; and he has a judge's immunity should he be called upon to act judicially. This, however, could hardly now occur. But in the old North American colonies, the Governor was, by the terms of his commission and instructions, empowered to sit as a Court of Error and Appeal in civil cases.

As regards criminal liability, all crimes committed by a colonial Governor must be tried, according to 11 & 12

William IV, c. 12, in the King's Bench or by special commission: and it was under this provision that Governor Wall was tried and hanged for murder in 1802, and that General Picton was tried in 1804 for administering torture when Governor of Trinidad. A Viceroy is in a different position; and it has been decided that no legal proceedings can even be commenced against one in respect of any act of State which he has performed. Similarly the Governor of a self-governing colony possesses wider powers than the Governor of a Crown one, whose authority is limited.

An Act of George III empowers the Governor and Council of any British Colony to remove any person, holding an office granted or grantable by patent from the Crown, who neglects his duty or misbehaves therein, though it also provides for the right of appeal to the Privy Council. By the latter it has been decided that, though no inflexible rule can be laid down, it would be highly improper that a judge charged with gross personal immorality, misconduct, corruption, or pecuniary irregularities, should continue to exercise his functions, whilst a reference to the Privy Council is taking place. Immediate suspension is in such a case necessary. Still, in doing so, a governor acts at his peril; and in effect both Governor and judge are in such an eventuality on their trials. But when the acts alleged refer to a judge's judicial duties, it is, in spite of the delay entailed, necessary that the matter should be brought before some weighty tribunal like the Privy Council, in order that the independence of the bench may be maintained. However, the great constitutional principle that judges hold office on a permanent tenure has now been extended to the colonies; and in the case of those colonies which possess responsible governments, provisions similar to those contained in the Act of Settlement have been enacted as to their removal.

With respect to Privy Council appeals, although the

Judicial Committee numbers amongst its members some distinguished colonial judges, the majority of these are still holding judicial posts in the colonies. Their regular attendance, therefore, cannot be secured. But it would be a great benefit to the Empire generally, besides making the Judicial Committee a more representative body, if the appointment of colonial judges, resident in England, could be secured to represent colonies or groups of colonies in the Privy Council.

Though India is not a colony, its system of government has some connection with this subject. It is curious that, although so long ago as the early years of George III, Lord Chatham conceived the idea of bringing that great territory under the direct control of the Crown; it was not until a century later, and after several compromises had been attempted, that this end was at length attained. India is now governed by the Emperor of India, acting on the advice of the Secretary of State for India. When it is necessary for the Crown to consult a council, it is the Council of India, and not the Privy Council—except as regards judicial matters—which is resorted to. The Secretary of State for India is responsible to the Crown and Parliament for the exercise of the royal prerogative. The Sovereign appoints the great officers, the Governor-General, the Governors of the Presidencies, the councils and the judges of the High Courts. The Viceroy can make peace or war; though the fact must be made known to the Imperial Parliament within three months.

Legislation is effected by the Governor-General in Council, whose powers are limited by the Imperial Act which created them. Yet within those prescribed limits, its powers are as great and far-reaching as those of the Imperial Parliament itself. Should the question at any time arise as to whether those powers have been exceeded, the established Courts of Justice are again necessarily the body

upon whom is cast the duty of deciding: and it is the determination of such questions which constitutes the main difference between an English and a colonial or Indian judge. For whereas the former could never dream of questioning the legality of an Act of Parliament, it becomes at times the duty of the latter to do so in the case of a colonial enactment.

The principal legal ties between England and her colonies may be summarised thus:—The Governors are appointed by the Crown; diplomatic intercourse, as regards foreign countries, is carried on by the Imperial Government; the Judicial Committee of the Privy Council is a supreme court of appeal from all Indian and colonial tribunals; the power of making treaties resides in the Crown, unless an Imperial Act authorizes a colonial government to do so; and the will of the Imperial Parliament is supreme in all things. In spite, however, of this sovereign supremacy, the latter in practice does not interfere in local affairs. The legislative liberty thus conferred upon colonies may at first sight seem incompatible with the sovereignty of the Imperial Parliament. But the absolute recognition of that supremacy is a sufficient guarantee for its maintenance: whilst the power retained of reviewing colonial enactments prevents the legal possibility of a conflict between Imperial and colonial laws.

ERASMUS DARWIN PARKER.

IV.—CRIMINAL STATISTICS, 1902.¹

THE gibe that anything can be proved by statistics has been on every one's lips during the recent discussion on the vexed Fiscal question, and like most popular notions, it represents no more than a half-truth. It is

¹ *Judicial Statistics, England and Wales, 1902.* Part I.—Criminal Statistics. London: Eyre and Spottiswoode.

undoubtedly a fact that statistics may be made to give any result by ignoring figures making against the conclusion it is desired to draw, and putting in high relief facts which support that conclusion; the more especially if the class to whom appeal is made does not demand a very high standard of evidence. One of the great sources of fallacy is a tendency to isolate or eliminate in accordance with prejudices and preconceived notions: if, however, caution and impartiality are observed, inferences from statistics may be valuable enough and conclusions drawn from their averages or fluctuations may be exceedingly instructive. The remedies against hasty generalization and faulty deduction from statistics are a keen logical sense, a sound knowledge of the conditions of rational proof and a practical acquaintance with the subject-matter with which the tables deal. It is the recognition of the importance of these preventives of error that makes the introductions year by year to the criminal statistics such valuable guides. Written by men of the keenest logical acumen and of the ripest experience in criminal procedure, they contain soundly-reasoned conclusions drawn from an examination of the figures in detail, as well as a careful summary of the general deductions to be made from the returns as a whole.

A special value attaches to the volume for 1902. In that year a period of 10 years had elapsed since the form of the statistics was completely revised, and the writer of the introduction, taking advantage of the opportunity afforded by the comparative tables, has dealt not only with the figures for 1902, but also with the changes in crime evidenced by a study of the figures for the decade. Sir John Macdonell, C.B., LL.D., who was responsible for the introduction in 1899, has again undertaken the task, and the inferences he draws from the tables are interesting alike to the criminologist and the mere layman.

To the latter, who may expect to gather from the tables

what is the total amount of crime in this country, these inferences may be disappointing. It must, however, be remembered that the criminal statistics are statistics not so much of crime, as of criminal proceedings; they are returns not of all crimes committed, but of persons prosecuted and crimes reported to the police. It has been maintained that the ratio of crimes committed and crimes reported to the police remains constant: this may be so, but the fact remains that it is impossible to gauge the total amount of crime. A burglar may commit many burglaries before he is prosecuted for one; the first theft of which a pickpocket is convicted, may not be by any means the first one he has committed; a person who obtains money or goods by false pretences from unsuspecting tradespeople may carry on these practices for a long time with impunity before any tradesman will be found to take the trouble to prosecute him, and even then the victim may prefer a civil remedy: many cases, again, must occur in which employers of labour decline to prosecute their employés for theft or other offences, either from kindheartedness, or from too lively an appreciation of the waste of time and trouble involved in attendance at a Court of Justice. This latter consideration, more especially, is one of the most notorious checks on criminal prosecutions. The average man who has money or valuables stolen from him in the street will hardly trouble to report the matter to the police: he bears his loss with equanimity, regarding it as one of the unfortunate accidents of life, and in the future is more suspicious of persons who knock up against him in the street, or who press unpleasantly close to him in a public vehicle.

In another class of cases, viz., cases of rape and indecent assault, a different reason operates to diminish the number of prosecutions. A natural and modest reluctance on the part of the woman or girl to face the publicity of a Court, crowded with the class of indecent persons who hug them-

selves over all the ugly details of such a case, is responsible no doubt for the failure to report to the police or refusal to prosecute in many such cases.

On the other hand, there are one or two crimes that are almost universally reported to the police. Such an one is burglary. It may be said that probably the number of burglaries reported to the police is almost identical with the number committed. There must be very few people who, if their premises were broken into, would not immediately report the fact to the police. In a less degree the same may be said of the crime of murder, although some murders may be so cunningly contrived as to awake no suspicion.

It will therefore be seen that there is considerable difficulty in giving any answer to the question whether crime is on the increase or is diminishing. The figures which are generally supposed to afford some clue to the answer are the number of persons tried at Assizes and Quarter Sessions, the number tried for indictable offences, the number admitted to prison, and the total crimes reported to the police. These returns are not all equally reliable as an index to the amount of crime, but when, as in 1902, they all show an augmentation on the previous year, the conclusion that there was an increase in crime seems a justifiable one. This is, at any rate, the conclusion which Sir John Macdonell draws from the combined returns, although he confines the increase to the more important forms of crime and points out that the rise was not serious.

Of the total number of persons on trial at Assizes and Quarter Sessions in 1902, viz., 11,393, as against 10,797 in 1901, 9,138 were convicted in 1902, as against 8,631 in 1901. The number of persons on trial for all indictable offences was 57,063, as against 55,453 in the previous year, or an increase of 2.9 per cent.; of these 45,676 were tried summarily in 1902, as compared with 44,656 in 1901. The increase extended to almost all the classes of indictable

offences : in Class I—offences against the person—there is an increase of 30, viz., 2,757 as against 2,727 : the number of persons tried for the gravest of all offences, viz., homicide, was 263, as against 245 in 1901 : in Class II—offences against property, with violence—there is a considerable rise, viz., 457, from 2,393 in 1901 to 2,850 in 1902. A large part of this increase is in cases of burglary : in Class III—offences against property, without violence—50,161 is the number, as against 49,094 in the previous year : the great bulk of these offences consist in simple larcenies : in Class IV—malicious injuries to property—there is a decline : in Classes V and VI—forgery, offences against the currency and miscellaneous offences—the figures remain much the same as in 1901, although forgery is on the increase and the number of attempted suicides still continues to grow.

Broadly considered, there was no marked change in the nature of the principal crimes of which offenders were convicted in 1902. The notable features are the increase of burglaries and the rise in the number of petty larcenies.

The same features are noticeable also in the police returns. The number of burglaries and like offences known to the police in 1902 reached a total of 8,617, as against 8,334 in 1901. The number of petty larcenies reported to the police in 1901 was 48,917. In 1902 it reached the large figure of 50,552.

The total number of indictable offences reported to the police in 1902 was 83,260 as compared with 80,962 the previous year. There was thus a rise of 2,298, or from 248.20 to 252.32 per 100,000 of population. For these offences 64,011 persons were apprehended, 6,532 of whom were discharged. A large proportion of offences therefore went unpunished, and this proportion is no doubt larger than appears from these figures, as it must be remembered that in some cases a number of persons may be prosecuted for what is returned as one offence.

But while there was an increase in the number of indictable offences reported to the police and in the number of persons tried for indictable offences, on the other hand, in the number of persons prosecuted for non-indictable offences, there was a marked fall. This is contrary to the movement which has, with few interruptions, been going on for many years. The number of persons tried summarily for non-indictable offences diminished from 736,966 in 1901 to 730,613 in 1902.

In detail the noticeable increases are: in Poor Law offences (9,894), an increase of 1,068; and in Vaccination offences (2,217), an increase of 621. The rise in the former is due in part to an increase in the number of paupers owing to scarcity of employment. The average number of paupers relieved each month in 1902 was (excluding vagrants and lunatics) 703,970, an increase of 12,759 on the monthly average for the previous year. An improvement in the prison dietary and the general amelioration of prison conditions may also have caused many paupers to prefer prison to the workhouse: possibly, too, there was a greater tendency towards severity in the treatment of paupers. The rise in the number of prosecutions under the Vaccination Acts is assignable partly to the fact that in some places there has been an epidemic of smallpox, and also, no doubt, to the greater zeal shown by the local officers acting under the influence of the Local Government Board.

Of the decreases the most interesting are: in offences against the Education Acts (70,184), a decrease of 8,330; and in prosecutions for drunkenness (drunk and disorderly or incapable, etc.) (209,908), a decrease of 434. In the former case the decrease is attributable to the greater severity shown by the magistrates towards offenders. It may also be due, as Sir John Macdonell suggests, to a greater appreciation of the benefits of education; but probably this motive does not operate very largely. The

returns of drunkenness show but a slight variation on those for 1901, which were the highest recorded. These figures depend to a very large extent upon the activity of the police, and, no doubt, of recent years there has been an increase in vigilance and greater zeal in enforcing the law owing to a strong public opinion.

To deal with habitual drunkards for whom detention in prison had no terrors, a new machinery was invented in the Inebriates Act, 1898. This Act has made it possible to seclude those whose incorrigible craving for alcohol renders them a danger to society; but it is disappointing to observe that the powers given to magistrates by this Act have been very sparingly used. The new machinery for reformatory treatment has only been put into motion in the cases of 278 persons in 1902, and of these 232 were women. The total number of persons detained in these Reformatory institutions in 1902 was no more than 419. In his report for the year in question, the Inspector under the Inebriates Act points out that a large number of Courts have made no use whatever of their powers; and in confirmation of this statement, he shows that up to the end of 1902 no magistrate had sentenced under this Act a single inebriate from a Court in any of the twelve counties of Bedford, Cambridge, Cornwall, Derby, Hereford, Huntingdon, Lincoln, Oxford, Rutland, Wilts, Suffolk and Westmoreland. On the other hand, from the counties of London and Lancaster came 314 and 95 cases respectively. This reluctance on the part of magistrates to put the Act into operation may be due to timidity or a natural desire to see how the new machinery works before they make the fullest use of it. It is to be hoped that in future, when the importance of the new legislation is more properly appreciated, the returns will show a more satisfactory result.

That most indictable offences are not of a serious character is evidenced by the fact that of the number of

persons convicted in 1902 for such offences, viz., 634,191, only 73,870 were sentenced to imprisonment in the first instance, while in 540,558 cases fines were imposed. The total number of persons received into prison in default of the payment of fines was 91,638. Though the number of persons who pay fines is still large, yet these figures show a considerable decline as compared with those for 1901. In that year there were 548,182 cases in which fines were imposed, and the number of persons who were imprisoned in default of payment was 86,536 only. As the majority of these offences are of a kind that may easily be committed by persons of some position and means who can afford to pay the fines imposed and to whom imprisonment is very much more prejudicial than any mere pecuniary penalty, it would be natural to expect that the proportion of those who pay to those who go to prison would grow larger, instead of smaller: more especially when one considers that the large growth of public and private legislation, involving the framing of bye-laws of all kinds, has multiplied enormously the number of petty offences which any respectable person may unwittingly commit. Probably the increase in the number of those who prefer to go to prison is to be attributed to the amelioration in the conditions of prison discipline due to the Rules under the Prison Act 1898.

The increase in the number of persons undergoing imprisonment in default of a pecuniary penalty is one of the causes of the growth in 1902 of the prison population. The total number of persons received into prison in 1902 was 207,384 as against 199,875 in 1901. Other reasons for this increase are a rise in the number of vagrants, and greater activity on the part of the police. The average daily population of convict prisons was 2,695 in 1901-2, and of local prisons 16,267; in 1902-3 it was 2,799 and 16,614 respectively. The average prison population is not a reliable index

to the amount of lawlessness prevailing; but the rise in the average daily number of persons in convict prisons would seem to bear out the view that there was in 1902 an increase, though not a serious one, in the graver forms of crime,

To sum up, there was in 1902 a slight increase, absolutely and relatively to population, in indictable offences, with a decrease in both respects in non-indictable offences. It is doubtful, however, whether the increase in indictable offences is more than a passing phase, evidencing a casual fluctuation not unnatural in a period of years, and resulting from a plurality of co-operating causes difficult to determine. No doubt the greater activity of the police, and a contraction of employment resulting from (among other circumstances) the late war, have assisted to raise the average.

The maintenance of an average in this branch of statistics, as in any other, is due to the permanence of the producing causes. Of this fact the Returns of Coroners' Inquests (Tables XXIX and XXX) afford a striking exemplification.

For the three years from 1899—1901 the total number of inquests held has been very nearly identical, an average of about 37,000. In 1902 the number was 36,092. Of these no fewer than 10,542, or 29 per cent., were held on children up to the age of 7 years: and 6,851 on infants under 1 year. The average for the 10 years 1893—1902 is 10,476 in the one case, and 6,592 in the other. The abnormal proportion of inquests on illegitimate children still continues. Legitimate births are more than 20 times as numerous as illegitimate, and yet the inquests on the former are only five times as many as the inquests on the latter. It must, however, be remembered that illegitimate children die more frequently in circumstances that call for inquiry.

Startling, too, are the figures as to children suffocated in bed, viz., according to these returns, 1,600: the average for the last 10 years is 1,500. Dr. Wynn Westcott, the coroner for the north-east district of London, in an interesting report

upon this subject, shows that the chances of overlaying diminish with the age of the child. He says, "The deaths of infants from suffocation have been classified with this result as to age: under one month there were 62; one to two months, 67; two to three months, 66; three to four months, 21; four to five months, 16; five to six months, 13; six to seven months, 5; and the others 4 or fewer. These figures show that the mortality diminishes with the age of the infant, until at a year old the risk of sleeping in bed with the mother is but trifling: this is because with advancing age babies being stronger are able to save themselves by their struggles, and so arouse their parents before a fatal suffocation has occurred."

In order to ascertain the cause of this mortality, inquiries have been made of all coroners returning 20 such cases and upwards. On the whole the opinions thus collected do not go to show that many of the deaths are due to criminal causes. Several, indeed, of the coroners are emphatic in their denial of the view that parents consciously contribute to such deaths. Some, no doubt, may be traced to the effects of drunken sleep on the part of the parents; but the majority of the cases are accidental—the almost inevitable results of conditions of overcrowding and of the mothers being dead-tired from excessive overwork. It is very rare to find verdicts of murder or manslaughter returned in such cases, and in 1902 there were only two verdicts of murder and none of manslaughter out of the 1,600 inquests.

The upward tendency in suicides, to which we have called attention in previous years, still continues. In 1901 the number was 3,106, as against 3,239 in 1902. The attempts to commit suicide were in the same years, 2,116 and 2,198 respectively. The steadiness of the increase may be shown by taking the average for the last five years and for the previous five years. For the last five years the average number of suicides was 2,980, and of attempted suicides

2,061: for the previous five years the figures are 2,694 and 1,860, and for 1857-61 the averages were 1,309 and 172.

Juries still continue to have a not unnatural distaste for finding verdicts of *felo de se*, notwithstanding the abolition of the original cause of this reluctance. Schopenhauer observed this, for he says in his "Essay on Suicide," "With suicide is allied, especially in brutal, bigoted England, a shameful burial, and the invalidation of the testament, for which reason the jury almost always bring in a verdict of insanity." It is true that the "shameful burial" is now done away with; but coroner's juries are still prone to return a verdict of "suicide whilst of unsound mind" out of a sympathetic regard for the feelings of the relatives of the deceased. At any rate, the number of verdicts of *felo de se* in 1902 was 42 only. The increase, continuous during the last fifty years, in the number of suicides and attempted suicides, is interesting as showing the development of the modern tendency to hysteria and neurasthenia which has left its mark on the literature of the country.

Table LII deals with the exercise of the prerogative of mercy. Occasionally the attention of the public is directed to the exercise of this power by the clamour of newspapers for the respite of this or that murderer who has been sentenced to death: and this form of its exercise is therefore the best known. In 11 cases in 1902 sentence of death was respited by conditional pardon, whilst in 12 other cases remission of sentence was granted on grounds affecting the original conviction, *i.e.*, on account of fresh evidence establishing the prisoner's innocence, or showing reasonable doubt of his guilt, or altering the view taken as to the nature and gravity of the crime. A free pardon is only granted in cases in which the accused person's innocence is established beyond doubt. There were only two such cases in 1902.

The second half of Sir John Macdonell's introduction is devoted to a consideration of the changes in crime for the

past decade. The general conclusions to which Sir John comes seem to be that there has been a decrease in the more serious forms of crime, but a large increase in the number of petty offences. He points out, in reference to the economic character of the decade, that on the whole these years were years of prosperity, not marked by any severe commercial crises, or many serious strikes—years in which the number of paupers was not large, in which exports and imports rose, and the bank rate was low. The only great disturbing factor likely seriously to affect crime was the South African war.

In the number of persons tried for indictable offences there has been on the whole a decrease during the decade continuous until 1896: less marked until 1899, and from that period there has been a slight rise each year. The figures for 1902 were slightly less than those for 1893, but they were considerably less per 100,000 of the population—roughly, 173 as compared with 193. The annual average of persons tried for indictable offences in the years 1883–93 was 57,273: from 1893–1902 it was 53,503, so that the last decade compares favourably with the preceding one. The average number of persons tried for indictable offences per 100,000 of the population was in 1883–7, 212, in 1888–92, 197, in 1893–7, 174, and in 1898–1902, 167. These figures point to a progressive decrease in crime relative to population which is very satisfactory. Confirmation of this decrease is to be found in the police returns for these years. The annual average of crimes (indictable offences) reported to the police from 1883–7 was 89,516, from 1888–92, 84,348, from 1893–7, 82,257, and from 1898–1902, 80,122.

Not much importance, therefore, attaches to the increase since 1899. The Summary Jurisdiction Act of 1899, extending from 12 to 16 the age up to which an offender can be tried by a Court of Summary Jurisdiction, has increased the number of prosecutions for indictable offences: and this

consideration, apart from the operation of economic causes, and from casual variations that are natural in a period of years, may easily account in part for the slight growth in the number of persons charged.

It is noteworthy that the aggregate of indictable offences depends chiefly on the figures as to larceny. The ratio between all indictable offences and offences against property remains practically constant. Of indictable (*i.e.*, really serious) offences, more than five out of six are cases of larceny and the like. Crime at Assizes and Quarter Sessions means, in the main, theft in various forms.

Taking the figures in detail, crimes of violence against the person have increased slightly: the annual average for the years 1893-7 is 1,600, and for the years 1898-1902, 1,617, whilst crimes against morals have decreased, the annual averages for the same periods being 1,169 and 1,103. The latter figure, however, should be accepted with caution, as among the non-indictable offences for these last years there may be included offences which should really be classed as crimes against morals.

Crimes against property show considerable variations in the ten years. The highest figures are shown by the first two and the last two years of the decade, but in the intervening years there is a considerable drop. The annual average for the two periods of five years from 1893-7, and from 1898-1902, shows a slight increase, the figures being 49,290 and 49,924 respectively. It is satisfactory, however, to learn that there is a decrease relatively to population in these offences, the figures being 162 and 153 per 100,000 of population respectively for these two periods.

A distinctly discouraging feature of these returns is the increase in the number of burglaries and kindred offences. The number of persons tried for such crimes in 1893 was only 1,863, whilst in 1902 the number rose to 2,550. A comparison of the annual average for each period of five

years, 1893-7 and 1898-1902 shows this very clearly, the figures for the one period being 1,763 and for the other 2,051 respectively. That this increase is a real one is shown by the police returns: the annual average of offences of this kind known to the police for similar periods being 7,495 for 1893-7 and 8,038 for 1898-1902. As against, however, the rise in the number of burglaries, it is consoling to note that the number of persons tried for larceny from the person has steadily decreased. In 1893 there were 3,993 persons put on trial for this offence; in 1902 the number was 2,639 only. The annual average of persons charged with this offence for 1893-7 was 3,573; for 1898-1902, however, the average was reduced to 2,963. These two features of the returns for the decade are of particular interest, because these two crimes are peculiarly characteristic of the habitual criminal. As evidence of this it may be observed, that of the total number of persons tried at Assizes and Quarter Sessions for burglary and larceny from the person, viz., 2,010 and 653 respectively, in the one case 478 were credited with a first offence and in the other no more than 80, while in the one case 1,360 had been previously convicted, 804 of whom had four or more convictions against them, and in the other case 468, 371 of whom were credited with four or more convictions. Moreover, 232 of the former and 105 of the latter had already served sentences of penal servitude.

Upon this class of offender imprisonment would therefore seem to have no deterrent effect: and, indeed, in the case of many offenders it may be said that once the first shock of contact with prison life is over, the fear of incarceration does not affect them. They know what to expect, and for further indulgence in crime are quite prepared to risk detention for another period, with the accompanying deprivation of alcohol and tobacco. It has been recognized that the present prison system is not altogether satisfactory as a deterrent to crime, but unfortunately there

is no certain cure for criminal habits, and all that can be done is in the way of prevention. Much in this direction has been accomplished by the prison authorities, who have established a new system of reformatory treatment for juvenile adults. And in the Bill introduced into Parliament this year, a scheme is propounded for dealing with the habitual criminal, by which it is frankly recognised that the only way of treating him is by seclusion and segregation, until he shows that he is fit to take his place in society once more. There are two types of the habitual criminal situate at opposite extremes of the moral scale. One is the person of strong will who has a lust for crime, just as a drunkard has a craving for alcohol. The other is a person of feeble character, who has fallen through sheer weakness of will. Most habitual criminals have drifted into crime by gradual steps. The persons who have adopted a life of crime by deliberate choice do not probably form a large class. The criminal statistics do not, as is natural, recognise the distinction between the criminal by choice and the criminal by accident, nor indeed do they throw very much light upon the question whether these two types are increasing or diminishing.

On the one hand, the police returns seem to point to a decline in the number. For the last four years the tables as to habitual criminals at large known to the police have shown a considerable drop. In 1898 the number was said to be 5,814: in 1899 it was returned as 5,749: in 1900, as 5,256: in 1901, as 4,813: and in 1902 it was reported to be no more than 4,320. These figures, of course, exclude all the habitual criminals known to the police who may be in prison, and due allowance must also be made for the habitual criminals who are not known to the police and do not therefore figure in these returns.

On the other hand, the proportion of criminals known to be recidivists to those not so known is steadily increasing.

It must be remembered, however, that within late years the method of identification of criminals has been immensely improved by the introduction of the finger-print system, so that the recognition of old offenders is rendered vastly more easy. Moreover, with short sentences, persons may figure twice or oftener in the same returns. But even these considerations are hardly sufficient to account altogether for the continuous growth in the number of persons previously convicted. The number is steadily rising, whether as tested by convictions at Assizes or Quarter Sessions or by receptions into prison. The increase, however, appears more distinctly in the figures as to convictions than in those as to receptions into prison. According to the former the per-centage of persons previously convicted was 55·03 in 1893: according to the latter, 50·09; while in 1902 the per-centages were 63·12 and 56·62 respectively. In 1902, moreover, 29 per cent. of the persons convicted at Assizes and Quarter Sessions had from 6 to 10 convictions recorded against them, while 9 per cent. were ex-convicts: and 39 per cent. of convicted prisoners had from 6 to 10 convictions against them, whilst 12 per cent. had 20 convictions and over. Curiously enough women are the most incorrigible of recidivists. Taking the prison population as a whole, men are to women as 3 to 1; among prisoners with previous convictions as 2 to 1: but in the case of prisoners hopelessly incorrigible, *i. e.*, convicted over 20 times, the proportion is reversed—women are to men as 3 to 2.

It has been said that, for the presence of so many habitual criminals in our midst, we have to thank the present humanitarian sentiment which has found expression in the short sentences now commonly passed upon prisoners. However this may be, the general tendency of the last ten years is, as Sir John Macdonell points out, towards mitigation of sentences and reduction of long terms of

penal servitude. One noticeable fact is the increase in the releases upon orders to enter into recognisances or to give security for good conduct; but perhaps the most remarkable change in sentences during the decade is the large increase in the proportion of persons released without any sentence; the proportion per 100,000 of the population being 386 in 1893 and 557 in 1902.

Another striking feature of the returns for these ten years is the enormous increase in the number of non-indictable offences. They have risen uninterruptedly till 1899, when they reached the highest point, viz., 761,322: in 1900 there was a distinct drop (717,225); but they rose again in 1901 (736,966), with a slight fall again in 1902 (730,613). In offences of a distinctively criminal character there has been a drop from 113,587 in 1893 to 95,333 in 1902: so that it is to the multiplication of petty offences that we must look for an explanation of the figures. Constant additions have been made by public and private Acts of Parliament to the powers of local authorities, necessitating the framing of new bye-laws and the creation thereby of new offences. Within the decade, offences against bye-laws, &c., have increased from 76,458 to 132,299. About 17 per cent. of all persons convicted are convicted for breaches of such regulations. Moreover, with the growing use of bicycles, motor cycles, and motor cars, the increase in highway offences has been considerable, 42,258 in 1902 as against 26,143 in 1893.

To the moral reformer the increase in gaming offences from 15,023 in 1893 to 25,019 in 1902 must be very discouraging, especially as it is probable that the prevalence of this vice is by no means adequately represented in these figures.

It will thus be seen that Courts of Summary Jurisdiction transact an enormous amount of business—in fact the bulk of judicial business—and the tendency of legislation in recent years is to throw still more work upon them. The

distribution of cases between Assizes, Quarter Sessions, and Courts of Summary Jurisdiction, has been materially altered in the last 25 years. In 1876-8, the average annual per-centage of cases tried at Assizes was 7'1, at Quarter Sessions 22'5, and at Courts of Summary Jurisdiction 70'2 : in 1900-2 the per-centages were 6'3, 13'4, and 80'3. That this huge mass of work is satisfactorily done by Courts of Summary Jurisdiction is sufficiently evident from the fact that out of 634,191 convictions, there were only 145 appeals, and of these in only 44 cases was the conviction quashed.

It would have been not unnatural to expect that the increase in the number of persons tried by Courts of Summary Jurisdiction would have tended to raise the number of persons received into prison, but this is not altogether borne out by the prison returns for 1893-1902, which show considerable fluctuations. There has, however, for the reasons stated previously, been a marked increase in 1901 and 1902. The number of persons received into prison in 1900 was 182,554 ; in 1901, 199,875 ; and in 1902, 207,384. It is noticeable that the prison population between the ages of 21 and 30 is 25 per cent. of the whole, and between the ages of 30 and 40, 32'49 per cent. of the whole. Into the latter class, no doubt, fall the bulk of habitual criminals.

Educationalists and others who hold the opinion that ignorance and crime go hand in hand, will learn with satisfaction that only 174, out of a total of 122,423 male prisoners, had received a superior education, and only 9 out of 48,665 female prisoners. The inmates of the prison are in the main the ignorant and uninstructed. This fact is curious, when it is considered that a generation has elapsed since the present educational system was established, and that the great majority of the persons convicted have grown up under it. Either they escaped the attentions of the school board officers, or they have forgotten all they learned. It seems evident from these figures—the results,

however, it should be remembered, of tests imperfect and not always identical—that a large class of the community is still little affected by elementary schools. In 1902, 17·5 per cent. of the prisoners could neither read nor write. There has, however, been an improvement in this respect, as in 1893 the per-centage was 20.

In view of the Aliens Bill introduced into this Session of Parliament it is interesting to find that the number of foreigners in prison has increased consistently in the last decade, and was in 1902 nearly double the figure for 1893: the number in that year being 1,982, and in 1902, 3,845. The proportion of prisoners to the total population of 16 years and upwards was in 1902, 797 per 100,000, while the proportion of foreign-born prisoners to the alien population of 15 years and upwards was 1,711. Again, the proportion of prisoners to the total population was 526 per 100,000, while the proportion of alien prisoners to the total foreign-born population was 1,552. These figures seem to prove that there has been a substantial increase in offences committed by aliens in this period, both absolutely and relatively to population, and to afford some justification for taking steps to prevent the importation of such undesirable immigrants into this country.

One last point should be referred to, viz., the effect of the Criminal Evidence Act 1898 upon the proportion of persons convicted to those not convicted. It was confidently expected by some people that this Act would operate considerably to the prejudice of prisoners. But this has not been so. The admission of prisoners as witnesses has had no appreciable effect upon the proportion of persons found guilty to those acquitted. The proportions remain about the same, the per-centage of acquittals for 1897—1902 being 17·96, 17·20, 18·09, 18·76, 17·25 and 17·23. Experience has, however, shown that the statute has worked admirably.

V.—THE NEUTRALITY OF GREAT BRITAIN: THE FOREIGN ENLISTMENT ACT 1870.

LORD RUSSELL of Killowen, L.C.J., in *R. v. Jameson*, defined the Foreign Enlistment Act 1870, as—"an expression by the Municipal law of international obligations, and it is also a mode of preventing this country from being embroiled with other countries by reason of unauthorised hostile acts, by subjects of the Crown in time of peace."¹ The Act was recited, as is usual on such occasions, in the King's declaration of neutrality on the outbreak of the Russo-Japanese war.² It is not necessary that an independent Sovereign State should make any proclamation or public declaration of neutrality; the legal presumption is, that its pacific status continues, unless it declares to the contrary.³ The practice of Great Britain, on the other hand, is always to issue a public declaration of neutrality, and the Foreign Enlistment Act, in force at the time, is always recited in it.⁴ "Historicus" (*supra*) observed that "the men who drew up this document (*i. e.*, the Declaration of Neutrality of 1861) knew what the Law of Nations was,"⁵ and pointed out that the declaration, in declaring the conveyance only of contraband illegal, was couched in precisely the language of Bynkershoek.

Legislation on the subject of foreign enlistment begins with the Stat. 3, Jac. I, c. 4 (1605), which made it felony, Blackstone observes,⁶ for any person whatever to go out of the realm without having taken the oath of allegiance before

¹ Cf. *Times*, July 29th, 1896, p. 13.

² *Times*, February 12th, 1904.

³ Halleck's *Int. Law*, Vol. II, p. 142.

⁴ Cf. *Letters of "Historicus" on International Law*, p. 131, for Proclamation of Neutrality put forth by Her Majesty's Government in May, 1861, on the outbreak of the Civil War in America; and Halleck's *Int. Law*, Vol. II, p. 177, for Proclamation of Neutrality put forth by Great Britain in 1877, on the outbreak of the Russo-Turkish War.

⁵ *Letters*, p. 132.

⁶ *Comment.*, Vol. IV, c. vii, s. 3.

his departure. The bond and oath were required to be registered in the Court of Exchequer, and accordingly the Court of Exchequer preserved an exclusive jurisdiction over cases of foreign enlistment till the Judicature Act 1873. In 1736, and again in 1756, some statutes were enacted for the purpose of preventing the formation of Jacobite armies in France and Spain, and annexed capital punishment as for a felony to the offence of entering the service of a foreign State.¹ These Acts for preventing enlistment in foreign service were repealed by the first section of the Foreign Enlistment Act 1819, the next provision on the subject. "The immediate practical object of this Act was to prevent," Sir J. F. Stephen observes,² "the enlistment of men, and the equipment of ships in England, in aid of the South American Spanish Colonies, then in revolt against old Spain." The latter great authority observes that for centuries, owing to the spirit of feudalism, there was not supposed to be anything objectionable legally or morally in foreign enlistment. The earlier statutes of Geo. II remained during all times a dead letter on the statute book, and prisoners taken from the Irish brigade at Fontenoy, Dettingen, Minden, and Culloden, were treated not as criminals, but as prisoners of war.³ This idea, that in practice it was not improper for persons who were so disposed to seek military service abroad, clearly survived in a power reserved to the Crown, in the Act of 1819, by Order in Council, of relaxing its provisions. In 1835, Great Britain signed the Treaty of the Quadruple Alliance, in favour of Queen Isabella of Spain, when a civil war raged in that country. Soon after the signature of this treaty, an Order in Council exempted British subjects who might engage in the service of Isabella from the penalties of the Foreign Enlistment Act. A Spanish legion was formed of British soldiers, and

¹ Halleck's *Int. Law*, Vol. II, p. 171.

² *Hist. Crim. Law*, Vol. III, p. 260.

³ *Ibid.*, p. 259.

commanded by a most distinguished British officer, Sir De Lacy Evans.¹ The Foreign Enlistment Act of 1819 made it an offence to enlist in the service of, or to supply a vessel² to insurgents. The previous statutes of Geo. II had only applied to the case of enlisting in the service of foreign princes or States. Sir J. F. Stephen points out that the proper course would have been to allow the offence of foreign enlistment to have been dealt with at the Common law, which of course punished breach of allegiance in all cases.³

The grave consequences, from a political point of view, and from the point of view of International law, of offences punished under the Foreign Enlistment Acts, have frequently formed the subject of judicial comment.⁴

In *R. v. Jameson*, Lord Russell of Killowen, L.C.J., said,—"In most criminal charges the consequences following upon the commission of the offence or crime charged, terminate upon the completion of the acts which constitute the offence. Unhappily, however, in this case that is not so, and the offence charged may possibly entail consequences the end of which no man can foresee." Lord Russell then proceeded to point out that this circumstance does not relieve the prosecution in cases under the Foreign Enlistment Act from the burden of establishing the charges, by evidence which will bring home to the understanding of each member of the jury the clear conviction of the guilt of those charged.⁵ In a case tried under the Act of 1819, Pollock, C.B., observed, in a spirit similar to the above observations,—“We have nothing to do with the political consequences of our decision or the dissatisfaction it may create in any quarter

¹ Cf. Phillimore's *Int. Law*, Vol. III, p. 218.

² The *Salvador* ([1870], L. R., 3 P. C. 218).

³ *Hist. Crim. Law*, Vol. III, p. 260.

⁴ *Per* Kelly, C.B., in *Burton v. Pinkerton* ([1867], L. R., 2 Ex. 340, 348); and *per* Wills, J., in *R. v. Sandoval* ([1887], 16 Cox, C. C., 206, 212).

⁵ See *Times*, July 29th, 1896.

anywhere.”¹ In a previous passage, Pollock, C.B., observed that it would amount to nothing less than the institution of a Court of Criminal Equity, as Lord Bacon called the Star Chamber, to allow the opinions of jurists, or the decision of foreign Courts, to induce the Court to declare an act to be an offence which was not so within the words of the statute. In a case tried under the Foreign Enlistment Act, 1870, s. 11, Wills, J, observed, in a similar spirit,—“The law is the same as to a small expedition and a formidable one, as to an expedition against a small State and a great State.”² Political consequences of an offence under the Foreign Enlistment Act 1870 are, therefore, to be altogether dismissed. But in *Attorney-Gen. v. Sillem* ([1863], 2 H. and C. 431, 508), Pollock, C.B., admitted that it may be useful to learn what has been the opinions of learned jurists; and in the same case, Pigott, B., said that there was no doubt that international obligations as between neutral and belligerent nations were the foundation of legislation on the subject of Foreign Enlistment. This seems clearly to have been the view of Lord Russell of Killowen, L.C.J., when he defined the Act of 1870 as “The expression by municipal law of international obligations,” in *R. v. Jameson*. Sir J. F. Stephen observes that the report of *Attorney-Gen. v. Sillem* (*supra*) contains a mass of the International law supposed to be connected with the subject of Foreign Enlistment.³

In this case it was said that there were two rules which govern the inquiry as to the extent of international duty which either of the belligerents may call upon a neutral State to observe. First, the subjects of a neutral power may lawfully sell at home, to a belligerent purchaser, or carry themselves to the belligerent powers, arms, ammu-

¹ *Attorney-Gen. v. Sillem* ([1863], 2 H. and C., 431, 510).

² *R. v. Sandoval* ([1887], 16 Cox, C. C., 206, 212).

³ *Hist. Crim. Law*, Vol. III, p. 262.

nition, or other contraband of war, subject to the right of seizure and confiscation.¹ This was the position of "Historicus."² But it must be remembered that it is disputed by Phillimore, who implicitly subscribes to the conclusion of Hautefeuille and Galiani, that a contraband trade is illegal, and that the neutral State ought to prohibit its subjects by the provisions of its municipal law, from engaging in it, even on the neutral territory.³ The letters of "Historicus" appeared in 1863, and the result of the conference of Geneva, 1872, constitutes a singular vindication of the view of one of his opponents, Abbate Galiani, Sicilian Secretary of Legation at Paris, expressed in a work published in the interest of the Armed Neutrality of 1782, on the Duty of the Neutral State to the Belligerent State. Galiani clearly seemed to adumbrate modern international usage and the award of the Conference of Geneva, when he said that a ship, built and armed for war in a neutral port, cannot be there lawfully sold to a belligerent. For this view the latter writer incurred the severest criticism of "Historicus," and had previously been criticized by Lampredi. The Conference of Geneva went beyond the position of Galiani, as the *Alabama* cleared from the Mersey unarmed, and only received her armament (which had, however, been despatched from this country) at a point outside our jurisdiction. In *Attorney-Gen. v. Sillem* (*supra*) the issue implicitly was whether an unarmed vessel was merely contraband or not, and Pollock, C.B., and Bramwell, B., held it was merely contraband. In a case tried under the shipbuilding section of the Foreign Enlistment Act 1870, sect. 8, Sir R. Phillimore observed that "this statute in no way affects the previously existing International law as to

¹ Kent, *Com.*, Vol. I, marg. p. 142; *The Santissima Trinidad*, 7 Wheaton's Am. Rep., 283, 340.

² *Letters, Neutral Trade in Contraband of War*, p. 121.

³ Phillimore's *Int. Law*, Vol. III, p. 321.

contraband; that the proceedings taken in this case have no reference to an offence of that kind.”¹ In *Attorney-Gen. v. Sillem*, Bramwell, B., considered an unarmed vessel was contraband and nothing more.² As a writer, Sir R. Phillimore had considered³ that “a ship sold for hostile use was contraband.” The startling conclusion seems logically to be induced, that there is nothing in the illegal shipbuilding section of the Foreign Enlistment Act 1870 that would prohibit a repetition of the *Alabama* affair, though the Act admittedly was passed to render such an occurrence impossible. According to the ground principles of neutrality, an unarmed ship, not provided with a commission, was nothing more than contraband.⁴ But if an unarmed vessel was never at the most anything but contraband, and the Foreign Enlistment Act 1870 has not, as Sir R. Phillimore stated, altered the pre-existing International law as to contraband, it is indubitable that there can be nothing in that Act that prohibits a vessel clearing from a British port under the circumstances of the *Alabama*. The fact that, in an indictment under this section, the jury disagreed and were discharged as regards a defendant who had purchased a ship that, like the *Alabama*, cleared from a British port incompletely equipped, and received her armament (despatched from this country) beyond British jurisdiction, lends apparent support to this conclusion.⁵

However, it is clear from the Report of the Neutrality Commissioners on the Foreign Enlistment Act 1870, no less than from the wording of the section, that the Act goes far beyond what International law requires in rendering it a crime to build a ship.⁶ The Act therefore prohibits, not

¹ *The International* ([1871], L. R., 3 A. & E. 321, 336). ² *Ibid.*, p. 540.

³ *Int. Law*, Ed. 1857, Vol. III, p. 360. ⁴ Hall's *Int. Law*, 4th Ed., p. 634.

⁵ *R. v. Sandoval* ([1887], 16 Cox, C. C. 206).

⁶ Wheaton's *Int. Law*, 3rd Ed., p. 593.

merely the conveyance of contraband, but even the preparation of a contraband article on neutral territory. It therefore becomes impossible to understand the observation of Sir R. Phillimore, in *The International*, that the Foreign Enlistment Act 1870 in no way alters the previously existing International law as to contraband. It is nearly as difficult to understand the subsequent observations of that very learned judge, that the conveyance of contraband is not cognizable by the Municipal law of this country, in view of sect. 8, sub-sect. (4) of the Act prohibiting the despatch of any ship with intent, etc., that it shall be employed in the naval service of a foreign State at war with a friendly State. This provision has been held to apply to the case of a vessel that is not generally connected with naval operations.¹ "Historicus," who took a view of the law of contraband entirely opposed to that assumed by Sir R. Phillimore in his treatise on International law, at least concurred with the latter in considering a ship of war contraband.² But since sect. 8, sub-sect. (4), of the Act prohibits the despatch of a ship, it prohibits, according to the current of authority, the conveyance of a contraband article.

It is impossible to interpret Sir R. Phillimore's observation that the Foreign Enlistment Act 1870 did not alter the pre-existing law as to contraband, although, as has been shown, the statute prohibits the preparation of a contraband article on neutral territory, as implying that the statute only enforced International law to this effect, as it is contended in Phillimore, that Municipal law always ought to do. In saying that the carriage of contraband was not taken cognizance of by Municipal law in this country, Sir R. Phillimore evidently did not consider the statute enforced International

¹ See *The Gauntlet* (L. R., 4 P. C. 184), in which case a steam tug was forfeited.

² See *Letters of "Historicus": Foreign Enlistment Act*, pp. 168, 171; and *Phillimore's Int. Law*, Vol. III, p. 370.

law. It is common ground that the conveyance of contraband is more certainly an offence by International law than its sale on neutral territory. But the illegal shipbuilding sections of the Act prohibit the preparation of a contraband article on neutral territory, and are only not an enforcement of International law because they go greatly beyond it.

A question has been recently asked in the House of Commons whether despatches addressed to or intended for the Government of a belligerent State by its accredited agents, or *vice versâ*, may be treated as contraband of war.¹ Phillimore observes: "Official communication from an official person on the public affairs of the belligerent Government, are such despatches as impress a hostile character upon the carriers of them."² The penalty is the confiscation of the ship which conveys the despatches, and, *ob continentiam delicti*, of the cargo, if both belong to the same master. A neutral master receives papers on board in a hostile port at his own hazard. The penalty of carrying despatches may be mitigated in cases where the commencement of the voyage is in a neutral country, and is to terminate at a neutral port, or at a port to which, though not neutral, an open trade is allowed. The leading case on the subject is *The Atalanta*, (6 Rob. Adm. Rep. 440). "Historicus," in discussing the *Trent* affair, observed that where a vessel has clearly a neutral destination she cannot be charged with the carriage of contraband. In the case of the *Trent* despatches were taken.³ This view does not accord with that of Phillimore, who merely considers that the fact that the vessel carrying despatches had a neutral destination, may be entertained in mitigation of the penalty of confiscating the ship and cargo. Phillimore considers that the mischievous consequences of carrying despatches extend far beyond the effect of any contraband that can

¹ *Times*, May 11th, 1904.

² *Int. Law*, Vol. III, p. 370.

³ *Letters of "Historicus,"* p. 191.

be conveyed, because the smallest despatch may turn the fortunes of war in favour of a particular belligerent. But despatches found on board a neutral ship, containing communications from a hostile Government to their Consul resident in a neutral country, are not, generally speaking, of the nature of contraband.¹

Mr. W. E. Hall observes—"Two classes of despatches are in this manner distinctly marked. Those which are sent from accredited diplomatic or consular agents residing in a neutral country to their government at home, or inversely, are not presumably written with a belligerent object, the proper function of such agents being to keep up relations between their own and the neutral State. The despatches are themselves exempt from seizure, on the ground that their transmission is as important in the interests of the neutral as of the belligerent country; and to carry them is therefore an innocent act. Those, on the other hand, which are addressed to persons in the military service of the belligerent, or to his unaccredited agents in a neutral State, may be presumed to have reference to the war; and the neutral is bound to act on the presumption. If, therefore, they are found, when discovered in his custody, to be written with a belligerent purpose, it is not open to him to plead ignorance of their precise contents; he is exonerated by nothing less than ignorance of the fact that they are in his possession, or of the quality of the person to whom they are addressed."² It was pointed out in *Attorney-Gen. v. Sillem* (*supra*) that the exportation of contraband might be prohibited by Municipal law under the Customs Regulation Act of that date (16 & 17 Vict., c. 107, s. 150). The law now in force on this point is the Customs and Inland Revenue Act (1879), Stat. 42 & 43 Vict., c. 21, Pt. 1, s. 8, by which the exportation of contraband articles may be prohibited by proclamation or Order in Council under the penalty of the

¹ *The Caroline* (6 Rob. Rep. 468). ² Hall's *Int. Law*, 4th Ed., pp. 699—700.

forfeiture of the goods, and a fine of £100 on the agent or shipper.

The second principal of International law governing the inquiry as to the extent of neutral obligation is that—"It is a violation of neutral territory for a belligerent ship to take her station within it, in order to carry on hostile expeditions from thence, or to send her boats to capture vessels beyond it. No use of neutral territory for the purposes of war can be permitted."¹

Bynkershoek² makes an exception to the general inviolability of neutral territory, and supposes that if an enemy be attacked on hostile ground, or in the open sea, and flee within the jurisdiction of a neutral State, the victor may pursue him *dum fervet opus*, and seize his prize within the neutral State. Casaregis, and other foreign jurists mentioned by Arzani,³ had a similar doctrine, while D'Abren, Valin, Emerigon, Vattel, Azuni and others, maintained the sounder doctrine, that when the flying enemy has entered neutral territory he is placed immediately under the protection of the neutral power. A large construction of this second principle is that the neutral territory should not be the basis of hostile operation. The second principle is clearly involved in the circumstances of the naval battle of Chemulpo, off the coast of Korea, in the present Russo-Japanese War.

The title of the present Act, the Foreign Enlistment Act 1870 (Stat. 33 & 34 Vict., c. 90), is—"An Act to regulate the conduct of Her Majesty's subjects during the existence of Hostilities between Foreign States with which Her Majesty is at peace."

Sir James F. Stephens thus explains the intention and character of the Foreign Enlistment Act 1870: "This decision (in *Attorney-Gen. v. Sillem*,⁴) and the claims made

¹ Kent, *Comm.*, marg. p. 118, *The Twee Gebroeders* (3 C. Rob. 162, 164).

² *Quæst. Jur. Pub.*, lib. 1, c. viii. ³ *Droit Maritime*, tome 2, c. iv, art. 1, ss. 5, 6.

⁴ [1863], 2 H. & C., 431.

by the United States against the British Government in respect of the damages done by the *Alabama*, led to the repeal of the Act of 1819, and the enactment of the Foreign Enlistment Act 1870. This Act forbids, in very elaborate language, all enlistments for the service of any foreign State, in terms closely resembling those of the Act of 1819, but its provisions as to providing ships of war for foreign belligerents are much more stringent than those of the Act of 1819. The Act of 1870 forbids building, or causing to be built, any ship with intent or knowledge, or having reasonable cause to believe that the same will be employed in the military or naval service of any foreign State at war with any friendly State. The Act of 1819 forbade only equipping, furnishing, fitting out, and arming, or endeavours to do so; and this, as interpreted by *R. v. Sillem*, meant a complete equipment. Moreover, extensive powers to seize suspected ships were given under the Act of 1870 (ss. 19—29), whereas the Act of 1819 dealt with the subject slightly, and in a manner shown by experience to be inadequate.”¹

In *R. v. Jameson*,² Lord Russell of Killowen, L.C.J., laid down certain rules of construction on the Foreign Enlistment Act 1870 that are of general application. The Act applies (1) to all persons, whether subjects of the Crown or aliens, who are in the United Kingdom or the dominions of the Crown; (2) to subjects of the Crown, whether within the dominions of the Crown or not. But the Act does not apply to foreigners in respect to acts done by them outside the dominions of the Sovereign Power enacting. “That,” Lord Russell proceeded to observe, “is a rule based upon International law by which one Sovereign Power is bound to respect the subjects and the rights of all other Sovereign Powers outside its own territory.”³

¹ *Hist. Crim. Law in England*, Vol. III, p. 262.

² L. R. [1896], 2 Q. B., at p. 430.

³ *Ibid.*, *supra*.

Another important comment of Lord Russell on the Act is that the provisions of the statute are susceptible of being divided into those that deal with a state of war, and those that deal with a state of peace. The sections prohibiting illegal enlistment (sects. 4—7) deal with a state of war. The sections relating to illegal prizes and illegal shipbuilding deal with a state of war. The sections prohibiting illegal expeditions deal with a state of peace. The object of the sections dealing with a state of war is to enforce the strict neutrality of the King's subjects to either of two belligerent States; the object of the sections dealing with a state of peace is to prevent unauthorized hostile acts by subjects of the Crown against any foreign State with which this country is at peace. In *R. v. Sandoval*¹ defendants were jointly indicted under the illegal shipbuilding section (sect. 8) of the Foreign Enlistment Act 1870, and the headnote of the learned reporter states that—"To constitute an offence within s. 8 an actual state of war must exist at the time of the alleged offence between the foreign friendly States." The facts in that case were that the revolution in Venezuela did not break out till after the vessel (the *Justitia*) had cleared from British waters and had arrived off the coast of Venezuela, and, therefore, at the time of the despatch of the vessel a state of war did not exist. One defendant was acquitted, and the jury disagreed as to another, who had purchased the ship in the name of his valet, and were discharged. It is curious to note that A. L. Smith, J. (afterwards Smith, M.R.), in the 'summing-up' in *R. v. Sandoval* (*supra*), directed the jury to decide, as regards the latter defendant, whether, when he purchased the ship in this country, he knew for what purposes she was intended, and did he purchase her with that express intent? The learned judge, therefore, did not take the distinction pointed out by Lord Russell of Killowen in *R. v. Jameson*

¹ [1887], 3 T. L. R., p. 411.

(*supra*), and urged in the argument of Finlay, K.C., in *R. v. Sandoval* (*supra* at p. 418), that under sect. 8 there must be a state of war existing between the two foreign nations. It is observed by Mr. A. C. Boyd that in *R. v. Sandoval* "the indictment under sect. 8 was clearly not sustainable."¹ But the learned editor does not notice, in his account of the case of the *Justitia*, that a defendant who had purchased the ship was jointly indicted with Sandoval, the defendant who was convicted under another section—sect. 11—dealing with illegal expeditions. The section dealing with illegal expeditions was clearly applicable to the facts in *R. v. Sandoval* (*supra*), because, as Lord Russell pointed out, it deals with a state of peace. Sandoval, it may be observed, did nothing to identify himself with despatching the vessel from England, and therefore as regards him the indictment under sect. 8 was clearly not sustainable. Although the learned judge did not *seem* take the distinction, the indictment against the purchaser of the ship seems as clearly not sustainable under sect. 8 because the belligerent operations with which the vessel was connected did not break out till after she was despatched from British waters. A cursory reference to the words of sect. 8 shows that it must fall under the head of Lord Russell's division of the provisions of the statute dealing with a state of war.

By sects. 4 to 7 inclusive of the 'Foreign Enlistment Act 1870, the penalties of this Act are incurred for foreign enlistment. By sect. 13 the maximum term of imprisonment that can be awarded is imprisonment for two years. Hard labour may be inflicted for any offence under the Act. By sect. 12 accessories are liable to be punished as principals. This is only an expression of the general law, Lord Russell of Killowen, L.C.J., observed in *R. v. Jameson*, as the offence is a misdemeanour in all cases under the Foreign Enlistment Act 1870.² By sects. 4 to 7, the Act prohibits (1) enlisting

¹ Wheaton's *Int. Law*, 3rd Ed., p. 594. ² Cf. *Times*, July 29th, 1896, p. 13.

in the service of a foreign State at war with a friendly State; (2) leaving her Majesty's dominions with intent to serve a foreign State at war, etc.; (3) embarking persons under false representations as to service under such circumstances; (4) taking illegally enlisted persons on board ship. No cases have been tried under these sections. The heading of sects. 8—11 is "Illegal Shipbuilding and Illegal Expeditions." The provision which was passed in consequence of the *Alabama* claims, is sub-sect. (1) of sect. 8 of the Foreign Enlistment Act 1870, which runs:—"If any person builds or agrees to build, or causes to be built, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State, such person shall be deemed to have committed an offence against this Act." The penalties therefore are fine, and imprisonment up to two years, with or without hard labour, and the forfeiture of the ship. In one case under sect. 11, a fine of £500 was imposed.¹

There can be no doubt that this provision is not only greatly in excess of the requirements of International, but even abrogates the Common law. In the year 1713, and again in 1721, the judges, in answer to a question by the House of Lords, expressed their opinion that the Crown had no power to prohibit the building of "Ships of War or of great Force" by foreigners, in any part of his Majesty's dominions.²

¹ *R. v. Sandoval* ([1887], 16 Cox, C. C. 206).

² *Fortescue*, 388.

(To be continued.)

VI.—CURRENT NOTES ON INTERNATIONAL • LAW.

• The War between Japan and Russia.

MANY points raised by the course of hostilities, since they began on February 8th, have been sufficiently discussed elsewhere, such as the beginning of hostilities by Japan without previous declaration of war, though after rupture of negotiations and an intimation that she would take the necessary measures for the defence of her rights and interests¹—the inclusion of coal in the Russian list of contraband, and provisions, including rice, capable of use in war and carried on account of or to an enemy destination—the restrictions imposed by neutral governments on the belligerents receiving supplies of coal in neutral ports, and they do not raise new questions. But there are others which are unusual and require the notice of neutrals. Firstly, the international position created by two Powers being engaged in hostilities in the territory of two other States, Corea and China, especially the latter, which remains neutral though having an army stationed near the boundary between Manchuria and the rest of China; and the consequent hindrance of the rights of other neutrals by treaty with China to trade at ports like Niuchwang which lie within the sphere of military operations. A somewhat parallel case is to be found in the position in the Spanish Peninsula, when the British and French armies were opposed to each other there, except that the territorial sovereign Spain was acting with Great Britain, or in one of the German States whose territory was the scene of a Napoleonic campaign. For practical purposes as regards neutrals Manchuria may be treated as Russian territory by

¹ See *Journal du Droit International Privé*, 1904, p. 257; and paper read by W. Martin Wood at International Peace Congress at Rouen, 1903.

occupation, whether with or without the consent of China: and at Niuchwang Russian military jurisdiction has been asserted, and neutral warships have absented themselves from the port. To the extent that such places are treated by the belligerents as falling within the sphere of warfare, the rights of neutrals must for the time yield to the necessities of war.

Secondly, the reported proclamation of the Russian Viceroy that any person transmitting news by wireless telegraphy from the Russian lines (including newspaper correspondents) are liable to be treated as spies, presumably because thereby news might thus be communicated directly or indirectly to the hostile forces. It is no doubt competent to the general of an army to give notice that he will punish any disclosure or information given by any one neutral or belligerent within the lines of the army or the limits of its operations to any other person, but no Power signatory of the Hague Convention can justify expanding the word "spy" (with its capital penalty) to include a person so offending. The Convention provides that only persons can be considered as spies who, acting secretly or under false pretexts, gather, or try to gather, information in the zone of operations with the intention of communicating it to the other belligerent: and the term is not applicable to persons sent in balloons to transmit despatches or generally to maintain communication between different parts of an army or a territory (Art. 29). By the same Convention (Arts. 30 and 31) a spy taken in the act cannot be punished without previous examination, and if he regains his army and is then captured, he is to be treated as a prisoner of war, and incurs no risk for his former espionage. By the Russian regulations issued for this war the attention of the Russian military authorities is directed to this among other International Conventions. In the Franco-German war the German military authorities took similar action to that

of Admiral Alexeieff, against persons passing over the German lines in balloons, not indeed punishing them capitally but imprisoning them; but this claim is now negatived as above. Whatever the origin of capital punishment for espionage, its present justification is no doubt based on the feeling that the strongest possible deterrent is required for insidious methods of warfare; but this is an additional argument against an arbitrary construction of the term. Modern opinion is more mercifully inclined, and regards imprisonment as sufficient in most cases (*e.g.*, Bluntschli, 353).

Thirdly, the use of floating mines by belligerents which, whether laid or not in the territorial waters, are found on the high seas and endanger neutral shipping. The view has been expressed by high legal authority, and even officially, that such mines may be legitimately laid in territorial waters, but not in the open sea, and it has been suggested that if mines have been legitimately so laid and are afterwards carried out to sea by weather, the belligerent is not responsible for injury which they may do to neutrals, like a stray shot fired at sea which accidentally hits a neutral ship. Under modern conditions of naval warfare it seems unreasonable for neutrals to insist on the ordinary three-mile fringe of territorial waters being the limit of offensive military operations, especially when the coast is in belligerent occupation, and to claim the free right of passage over the waters outside that boundary. Neutrals may have the right to claim that the high seas not within the immediate sphere of belligerent activity shall not be rendered unnecessarily dangerous to their ships lawfully passing, but they cannot complain of *mala fides* or recklessness of belligerents if they do not take account of new conditions of warfare. But an initial difficulty in the way of any protest by neutrals in this matter is that there is no binding limit of territorial waters in International

law. It is true that more nations have accepted the three-mile limit than any other, that it was declared by the Behring Fisheries Arbitration Commission to be the "ordinary limit," and that it was adopted in the North Sea Fisheries Convention of 1883, in the Suez Canal Treaty of 1888, and by the fishery treaty of 1839 between Great Britain and France, as well as by their legislations. Official recognition of it, however, does not go further back than 1792, when the United States adopted it as being the extreme range of cannon, and it is not admitted by Norway, which claims four miles, or Spain, which claims six miles, and Russia, Germany, Austria, Italy, and Denmark have refused to be bound by it, and regard four miles as the minimum.¹ An important *Projét*, framed by Sir Thomas Barclay and accepted substantially by the Institute and the International Law Association in 1894 and 1895 respectively, proposed as the limit of territorial waters a distance of six miles from low water-mark, but allowed it to be extended to a distance corresponding to modern cannon range for purposes of neutrality by a notification from the neutral "riverain" Power to that effect; and in 1896 the Netherlands Government suggested to the other Powers the desirability of fixing such limits by international convention. Though other powers were not disinclined to the proposal, the British Government declared itself unfavourable, and it came to no result. Sir T. Barclay, in a paper read before the Association Internationale de la Marine at Copenhagen in 1902, explained that his *Projét* proceeded on the principle that one limit should be recognized for neutrality, and another for other purposes, such as police, fishery, navigation and the like, and pointed out that the alternative limits of actual cannon range (upheld by M. Martens) for all purposes would be unsatisfactory, being based on the abnormal international condition of war, while the old three-

¹ Institute, *Ann.*, 1894, 134; and see Sir T. Barclay's paper, *Ann.*, 1893, 104.

mile limit was admittedly inadequate for all purposes. One result of the present war may be to impress statesmen with the international importance of an universally accepted limit for this purpose; but it must be remembered that the extension of territorial waters means a corresponding enlargement of the sphere of duty of the "riverain" sovereign.

Uniformity in Maritime Law.

The Foreign Office has again disappointed the legitimate hopes of those who are anxious that Great Britain should take her proper position in the movement for promoting uniformity of Maritime law, by refusing to take official part in the proposed International Conference at Brussels for this purpose, on the grounds that this is in accordance with a long-established and carefully considered policy, that participation might be held to imply acceptance of the conclusions of such a Conference, in which other countries having a far smaller interest than Great Britain would have an equal representation with it. . None of these objections were thought sufficient to prevent Great Britain taking part in the Washington Conference of 1889, at which the present Collision regulations were adopted. At that Conference Sir Charles Hall, the leading British delegate, made it clear at the outset that he was not a plenipotentiary, and could only recommend for the consideration of his Government the conclusions of the Conference. The prominent position which he and Dr. Sieveking, the eminent President of the Hanseatic Court, as representative of Germany, took in the Conference showed that the smaller Maritime Powers are quite willing to follow the guidance of the larger ones in these matters. The Continental promoters of the present movement have repeatedly recognised the pre-eminent influence and interest of Great Britain in this matter; and more was not expected of our Government

than a representation *ad referendum* as was adopted by ourselves at Washington, and is recognised to be the scope of the recent Hague Conferences* on Private International law. The argument from previous policy ignores the new conditions created by the general movement towards assimilation of municipal laws which is being felt everywhere. The official intimations that the project of uniformity in Maritime law has the sympathy of the Government, and that it will secure full information of the discussion and decisions of the Conference, and examine its proposals in the most friendly spirit, may, however, be taken as signs that the Foreign Office has not said its last word on the subject.

The Netherlands-South African Railway Company.

In a pamphlet recently published, Professor Meili, of Zurich University, has stated the case of the shareholders and debenture holders of the Netherlands-South African Railway Company against the British Government, which has been in possession of their line since the British army occupied Pretoria in 1900 (already discussed in this Magazine, August, 1901, XXVI, 481). The question has entered upon a new phase with the offer made in January, 1903, by our Government to the shareholders and debenture holders for purchase of their holdings, which is not yet, it is believed, accepted. The terms are said to be £135 for each share proved to have been in private hands previously to the outbreak of the war, excluding shares which were the property of the South African Republic itself, or of directors or officials of the Company, all of whom must be held to share in the responsibility for the actions of the Company, with interest at four per cent. on the value of each share fully transferred, namely, £83 : 6s. 8d., from September 1st, 1900 (the date of annexation) to the date of transfer, the Government reserving to themselves the

right of paying off the debentures at par with interest from the same date, and of paying for shares or debentures in cash or in Transvaal stock. This offer shows a distinct advance on the recommendation of the Transvaal Concessions Commissioners that the ordinary shares should be confiscated because of the hostile conduct of the local administration (*Law Magazine*, XXVI, 481), and it is satisfactory that by admitting the right to compensation the Government have avoided a course which might have been used as a precedent by other belligerent States for refusing such a right to British *cessionnaires* under similar circumstances. The question whether concessions, granted by a State which is afterwards incorporated in another, bind the new sovereign, does not therefore strictly arise; for the Report of the Commission and the present action by the Government recognise the principle to this extent, at any rate, that in International law the new sovereign should recognise certain obligations of its predecessor. Professor Meili assumes as established in International law the principle that an incorporating State is liable for all the obligations of its predecessor, and entitled to all his rights as an universal succession, except such as are purely personal. Mr. Erle Richards in this Magazine (February, 1903, XXVIII, 129) has pointed out the limitations of the "universal succession" theory (which is not of positive international obligation), and suggested as a more practical rule that a State succeeding to another is bound to satisfy all the obligations arising out of the assets which it acquires; but this principle of a "real" obligation does not seem inconsistent with the Continental view, either as stated broadly by Professor Meili or as expounded by Huber in his standard work (*Staaten-succession*). The question, however, what is the true international rule, is raised by the British offer of compensation being limited in amount and to particular classes of persons.

Professor Meili treats the contentions of our Government under three heads: (a) that it is not an obligation but an act of grace for the British Government to carry out the obligations of the South African Republic Government, (b) that our Government is not bound to pay for the shares because the administration of the Railway Company was guilty of hostile and unneutral conduct towards Great Britain and thereby forfeited its concession, (c) that shareholders are not entitled to compensation whose title accrued since the war. With regard to the first position it seems no longer of practical importance, in view of the admission by the Commission of the general rule of State succession above stated in the words, "the best modern opinion favours the view that as a general rule the obligations of the annexed State towards private persons should be respected"; and whatever the value of the second may be, it is waived by the present offer of compensation. The third position, however, is still insisted on, and with regard to it Professor Meili contends that until the existence of the South African Republic ended (which it only did with the signing of peace in May 1902) Great Britain did nothing to make the shares of the Company *extra commercium* or not disposable by notification to the other States; and as she never reduced such shares into her possession the South African Republic could freely dispose of them. He concludes by urging that Great Britain has only the same rights as regards the railway as the South African Republic had, and that if it takes over the Company's property it must do so on the terms provided in the concession (twenty years' purchase of the average of the three last years' profits), without any regard to the present market value of the shares, basing this on the general principle of State succession, and on the provisions of the Hague War Convention requiring that the property of individuals shall be respected by the occupying hostile Government, only State property passing to it.

It seems difficult to contest this conclusion if the theory of State succession were admitted even to the extent suggested by Mr. Richards. But the actual money value of the shares ascertained as above is admitted by Professor Meili to be liable to be reduced by a counterclaim by our Government for improvements in working the line which have enhanced the value; it also depends when the three years for average are to be taken. But the argument based on the Hague Convention ignores the fact that the Convention does not actually apply to the conquest of territory but only to the occupation of enemy's territory, and although such a rule would be recognised as morally binding for most purposes by most States, it is not a matter of positive obligation between them. No international treaty prevents an annexing State dealing as it likes with private property in its new territory, and in England acquisition and cession of territory can be made by the Executive without the co-operation of Parliament.

With regard to the distinction drawn by our Government between shares held before the war and those acquired since, there is no doubt that the accepted International law rule is that a conqueror does not acquire incorporeal property situated outside the conquered territory till he has reduced it into possession; and there is no international practice authorising Mr. Richards' suggestion that a conqueror can make it a condition of accepting liability, in respect of assets found in the conquered State, that other assets situate outside it and belonging to that State shall be delivered to him. There is considerable force in the argument that until a State's existence is actually and definitively ended it shall have full right of dealing with its own property, and that neutrals acquiring such property from it *bonâ fide* without notice of objection from the conquering State should make a good title to such property against the latter; and it may be conceded that at the time of the annexation Great Britain

was not *de facto* sovereign of the country. But it cannot be expected that a conquering State will admit the right of the opposing Government to dispose of the State's property up to the moment when it actually succumbs, or give a valid title against the conqueror to neutral persons who have purchased it. Besides, who is to say what is the moment at which a State ceases to exist under these circumstances? The conqueror certainly is entitled to treat his declaration of annexation as that point of time and a sufficient notice to the world of the change of sovereignty, and he is entitled to take that as the date when the former sovereign's power to deal with the State property came to an end. The annexation, and not the beginning or the close of the war, would seem to be the fairest point of time for fixing the various parties' rights in this matter: our Government itself seems to admit this by offering the shareholders interest as from this date: and this solution might satisfy the rights of the Government and the neutral shareholders.

Foreigners and Poor Prisoners' Defence Act.

It is reported that in a recent criminal case against a foreigner, where the prisoner applied for legal assistance under the Poor Prisoners' Defence Act, the judge expressed the opinion that the Court did not provide counsel for foreigners as such, and that it was the duty of the Consul of the prisoner to see to this. There is nothing in the Act to restrict this privilege to British subjects, and on the general question of the application of our statutes it has been laid down that "where personal rights are conferred on persons filling any character of which foreigners are capable they are comprehended in it unless the context shows that they are to be excluded." (See this Magazine, Vol. XXVII, 225.) If, however, this is not so, and it is desired that British subjects should obtain the benefit of similar *assistance judiciaire* abroad, there will be an additional

reason for our Government adhering to the Hague Convention of 1896, giving mutual reciprocity in this respect to the subjects of the various signatories. Apart from this, it would certainly seem strange not to allow foreigners resident here to have the same right to legal assistance in criminal cases as they have in civil.

Foreign Creditors, in Winding-up of Company.

In *In re Pretoria R. C.* ([1904], W. N. 140, July 5), a foreigner residing in Holland, who applied by originating summons to prove for a debt in the voluntary winding-up of a company, was only allowed to do so on giving security for costs according to the ordinary rule for plaintiffs out of the jurisdiction. The Court held that, though there was no such express provision in the Companies Winding-up Rules it was obligatory by the ordinary practice of the High Court.

G. G. P.

VII.—NOTES ON RECENT CASES (ENGLISH).

IN our issue of February last (at p. 225), in commenting on the decision of Buckley, J., in *Cowper v. Laidler* (L. R. [1903], 2 Ch. 337), we said, "Whether the law" (as to rights to light) "as it stands on the decisions would come scatheless out of a fight in the House of Lords seems very doubtful, in view of the mode in which that august tribunal received the decision of the Court of Appeal in *Chastey v. Ackland* (L. R. [1897], A. C. 155)." We have not had very long to wait to see our doubt turned into a certainty. The law as to rights to light has been in a fight in the House of Lords, and it has not come out scatheless. In fact, in *Colls v. Home and Colonial Stores, Limited* (L. R. [1904], A. C. 179), their Lordships, by unanimously reversing a decision of the Court of Appeal, have worked a very

revolution in the law of light. And, like many revolutions, the result of it is merely to restore the ancient law freed from the corruptions and perversions of later times.

The history of the case is shortly this: Joyce, J., following with apparent doubt (*see* L. R. [1902], 1 Ch., at p. 305) the decision of Wright, J., in *Warren v. Brown* (L. R. [1900], 2 Q. B. 722), held that an interference with a right of light was not a ground for the issue of an injunction, unless such interference was so substantial as to render the dominant tenement less fit for occupation. On appeal, the Court of Appeal reversed this decision (L. R. [1902], 1 Ch. 302), on the ground that the owner of the dominant tenement is entitled by law to all the light which comes over the servient tenement to his windows, and that consequently any diminution of that access of light, whether it in fact damages the dominant tenement or not, is an interference with the owner's legal rights which he is entitled to have restrained. The House of Lords has now restored Mr. Justice Joyce's decision, and in doing so has given an exposition of the law as to light which is as valuable as it is learned.

In particular, Lord Macnaghten's judgment is worthy of the most careful perusal. He traces with his usual learning and perspicuity how, by the decisions of the Chancery judges, the right which at Common law was simply a right to prevent the erection on the servient tenement of any obstruction to the access of light, which amounted to something in the nature of a nuisance to the dominant tenement, was gradually transformed into a right to prevent any interference with the access of light, whether or not the interference inconvenienced the owner of the servient tenement. Then he shows that the Common law still controls the right, and the Chancery Court was called in merely to enforce such right by injunction. And he further points out that the

Prescription Act 1834 was never intended to alter the nature of the right. As far as that right has been altered by Chancery decisions, it has been altered unconsciously by the pernicious habit of Chancery judges in deciding points of fact, not by evidence, but by authority. It is the old story, in fact, of constructive fraud over again. In the issue of this Magazine to which we referred above (February, 1904, at p. 218), we pointed out how this habit misled the same judge (Joyce, J.) and the same Court of Appeal, in regard to copyright in magazine articles. And in our subsequent May issue, commenting on the same case (p. 343), we pointed out how a Common law judge (Vaughan Williams, L.J.) was the first to draw attention to the error. Here, again, we may observe that a Common law judge (Wright, J.) again occupies this honourable position.

There are some remarks in Lord Macnaghten's judgment which should be, we humbly submit, gravely considered by Buckley, J. In fact we have a suspicion they were intended for his consideration. In commenting on his decision in *Cowper v. Laidler* (*supra*), we protested against his peculiar view that for an owner of a dominant tenement to insist on screwing as much money as possible out of his neighbour for leave to obstruct lights useless to himself, was a perfectly legitimate proceeding, and should not be described as extortion. We said no conceivable doctrine could be invented better adapted to prevent all improvements in towns. (February, p. 223). These remarks can now boast the authority of Lord Macnaghten (L. R. [1904], A. C., p. 193).

In view of the decision of *Colls v. Home and Colonial Stores, Limited* (*supra*), it is questionable whether the decision of Kekewich, J., in *Ray v. Hazeldine* (L. R. [1904] 2 Ch. 17), is correct. Here the owner of two adjoining tenements sold one of them and retained the other. The

purchaser of the one sold afterwards built a wall which blocked the window of a pantry in the house retained to such an extent as to render it unfit for use. Now no doubt the rule is that a vendor has no easements over land he sells except those he expressly retains; but to have no easement and to be compelled to submit to something which makes your house unfit for use are different things. The principle of *Colls v. Home and Colonial Stores, Limited* (*supra*), and the views expressed in the House of Lords in *Chastey v. Ackland* (L. R. [1897], A. C. 155), seem to indicate that independent of any easement the owner of a tenement is entitled to have such access of light and air to it as will render it habitable.

Our old friend the precatory trust, which most people thought had seen its last days, was up and about lately. Possibly, however, it was only the ghost of its former self. At any rate, the reception it received should finally lay it. These were the facts in *In re Oldfield, Oldfield v. Oldfield* (L. R. [1904], 1 Ch. 549): A testatrix left her property absolutely between her two daughters. Then she added, "I desire" that each daughter should pay a son one-third of her income. On behalf of the son this was said to create a trust of one-third of each daughter's share for his benefit. It is hardly necessary to say that both the Court below (Kekewich, J.) and the Court of Appeal held that such a contention was unarguable.

The decision of Farwell, J., in *Attorney-General v. Corporation of Nottingham*, (L. R. [1904], 1 Ch. 673) is one of much importance to the public health. He there held that a small-pox hospital was not a nuisance. If the decision had been otherwise, it is difficult to imagine how local authorities of large and crowded towns could carry out their duties as to infectious diseases.

Sanderson v. Collins (L. R. [1904], 1 K. B. 629; 73 L. J. R., K. B. 358; 90 L. T. R. 243), has removed a diversity which *Coupé Co. v. Maddick* (L. R. [1891], 2 Q. B. 413; 60 L. J. R., Q. B. 676) set up between the liability in tort and in bailment of a master for the negligent acts of his servant. Naturally, the faults of coachmen and carmen have supplied a number of illustrations of both divisions of the liability; and it is equally natural that the views of judges have varied as to the conditions which, in such faults, gave rise to the liability. Divergent views took place on the fundamental principle before the division was arrived at between the liability in bailment and in tort.

The old law was that the master's responsibility arose only when the servant was acting in the course of his employment. *Joel v. Morrison* ([1834], 6 C. & P. 501) held that no claim could be sustained against the master of a servant who, "on a frolic of his own," as Baron Parke called it, had taken out his master's carriage and caused injury in his unauthorised drive.

But this doctrine had only a brief existence. In *Sleuth v. Wilson* ([1839], 9 C. & P. 607), Erskine, J., held that where a servant, disobeying an order to put up his master's carriage at a specified place, had driven off on his own account in another direction and caused injury by negligence on his way, the master was liable, because he had "put it into the servant's power to mismanage the carriage by entrusting him with it."

Apparently this rule remained good till 1853, when, in *Mitchell v. Cressweller* (13 C. B. 237), Maule, J., said, "The question is not whether the servant was trusted, but whether he was employed so as to make his master liable." Part of the decision in *Joel v. Morrison* had been that the master is not relieved from liability when the injury is caused on a detour which the servant has made for his own purposes

while driving his master's carriage on his master's business; and probably in reference to this, and apparently with a reluctant assent to it, Jervis, C.J., said, in *Mitchell v. Cressweller*, "I think, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs on a journey on which the servant has originally started on his master's business." *Sleuth v. Wilson* was referred to in the case, but was not mentioned in the judgment. But in *Storey v. Ashton* ([1869], 4 Q. B. 476) the Court refused to accept the view of *Sleuth v. Wilson*, and held that *Mitchell v. Cressweller* expressed the true view of the law. The facts of *Storey v. Ashton* were that the defendant had, in his own van, sent his carman to deliver goods and bring back empties. On the return journey, after the usual business hours, but before depositing the empties on his master's premises, the carman drove in another direction and caused the injury complained of. It was held that the master was not liable, as the negligent act was not done in the course of the servant's employment; but that if the carman had been merely going a roundabout way home, liability would have attached to the master.

All the above were cases of tort, but in *Coupé Co. v. Maddick*, where the circumstances were similar to those of *Sleuth v. Wilson*, except that the carriage was hired, the Divisional Court were of opinion that conditions which would attach to a master no liability in tort, might fix him with responsibility as a bailee. The decision seems to have been founded upon considerations of public advantage, for, in the written judgment, it was said if the loss were to fall upon the owner of the carriage who does not engage and cannot dismiss the driver, it might lead to a refusal to let out horses and carriages; but if the hirer had to bear the loss he would exercise greater care in the selection of his servant. Upon the authority of this case, the Divisional Court, when *Sanderson v. Collins* (L. R. [1901], 2 Q. B. 413) was before

it, decided that the master was liable for injuries to a carriage lent to him while his own was being repaired by the lender, although they were caused by the master's servant while driving the carriage without leave for his own purposes. This has been now overruled by the Court of Appeal; and with regard to *Coupé Co. v. Maddick*, Romer, L.J., said, "The decision can only be supported upon the view that the servant was at the time of the accident acting in the course of his employment. If and so far as the case was decided on some broader ground of the liability of the defendant as a bailee, I can only say, speaking for myself, it would appear to me to have been wrongly decided."

Another case in which the responsibility of the principal for the acts of his servants was brought into question, and in which the ruling of an earlier case was reluctantly followed, is *Ruben and another v. Great Fingall Consolidated Limited and others* (L. R. [1904], 1 K. B. 650; 73 L. J. R. 299; 90 L. T. R. 163). The secretary of the defendant company borrowed money on the security of share certificates to which he had forged the signature of directors and had fraudulently affixed the company's seal; and it was held that, under *Shaw v. Port Philip Gold Mining Company* (13 Q. B. D. 103), the company was estopped by the certificate from disputing the right of the plaintiffs to be registered as the owners of the shares. But Kennedy, J., said that if he had not felt bound by this case, he should have preferred the view that a company is not liable to make good a loss to a third party which has been caused by the fraud of its servant for his own purposes.

There is a great deal of authority on both sides. In an action of Deceit, *The British Mutual Banking Company, Limited v. The Charnwood Forest Railway Company* ([1887], 18 Q. B. D. 714), Bowen, L.J., said, "A principal is not liable for the unauthorized and fraudulent act of a servant

or agent committed not for the general or special benefit of the principal, but for the servant's or agent's private ends." And *Shaw v. Port Philip Gold Mining Company* has been adversely criticised by the Master of the Rolls and by Mr. Justice Buckley in their respective books on Company law. Probably *Ruben v. Great Fingall Consolidated* will be carried higher. It is very desirable to have a decisive ruling on the sanctity or otherwise of a seal when fraudulently applied to a share certificate.

In *Harse v. Pearl Life Assurance Company* (L. R. [1904], 1 K. B. 558; 73 L. J. R., K. B. 373; 90 L. T. R. 245) an opinion was expressed from the Bench that "the agents of an insurance company are not under a greater obligation to know the law than ordinary persons whom they approach in order to effect an insurance." This would deserve general assent if the subject upon which the insurance agent exercised his want of knowledge, and represented it as real knowledge, was upon any other point of law than such fragment of insurance law as applied to the simple branch of insurance business, to promote which he was employed by a payment on results. But assent cannot be so readily given in the case where an insurance agent puts it into the head of a person to insure a non-insurable interest, and strengthens the suggestion by the statement that the policy is valid. Yet the Court of Appeal, reversing the decision of the Divisional Court (L. R. [1903], 2 K. B. 92), have held that as the policy issued was void, the parties were in *pari delicto*, and the premiums that have been paid cannot be recovered.

There seems to be room for the question whether, considering the special business of the agent, his positive assurance, though innocently given, that the policy would be valid, does not import that recklessness which carries with it responsibility. The position of the Company seems

also open to question. The proposal-form of the plaintiff seems to have stated the purpose of the insurance and the full circumstances, from which the Company could not fail to know that they were engaging in an illegal transaction induced by their own appointed agent, whom they apparently allowed to continue in his ignorance, entirely to their own advantage and to the inevitable loss of the other party to the pretended contract: and their formal policy presumably expressed that they were bound in a certain event to pay money which they must have known they could not be forced to pay. It is probable that a considerable number of transactions of this nature are entered into with the poorer classes.

The decision of Bigham, J., in *Hambro v. Burnand*, noted in the February number of this Magazine (Vol. 29, No. 331, p. 225), has been reversed by the Court of Appeal (L. R. [1904], 2 K. B. 10), on the principle that when a written authority given to an agent covers the thing done by him on behalf of his principal, no inquiry is admissible into the motives upon which the agent acted.

T. J. B.

SCOTCH CASES.

The recent English case, *Logan v. Bank of Scotland*, decided by the Court of Appeal on 5th July, may be noticed here, because of its bearing upon the international relations (juridically speaking) of England and Scotland. The judgment leads to the curious result that a domiciled Scotsman may resort to the English Courts in order to sue another domiciled Scotsman in relation to a Scottish cause of action. There is, however, the all-important qualification that the defender must "have a domicile in

England in addition to his Scottish domicile." In the words of Lord St. Leonard, "There may be two domiciles and two jurisdictions . . . one in Scotland and one in England, and for the purpose of carrying on business one is just as much the domicile of a corporation as the other" (*Carron Company v. Maclaren* [1855], 5 H. L. C. 416, at p. 459). Scottish corporations who do banking business in London have no reason to complain of having to submit to the jurisdiction of the Courts of England as well as those of Scotland. (See Blackburn, J., in *Newby v. Colts Patent Manufacturing Company* [1872], 7 Q. B. 293). When the Judicature Rules were first framed, it looked as if every Scotsman was liable to be dragged to London to answer the complaint of any English plaintiff who had, or imagined he had, a case against him. There were several instances in which the power was exercised, but the outcry in Scotland was so great and so well-founded that the Lord Chancellor of the day altered the rule, and brought it within reasonable limits. In the present case, there being clearly a domicile in London, there was no special hardship, but in the circumstances it might have been wiser to have declined jurisdiction and left the matter to be dealt with in Scotland in terms of the permission given by Order XI, r. 2. Such a course, if adopted, would have resembled a Scottish declinatur^e on the ground of *forum non conveniens*.

By far the most important Scottish judgment of the quarter is that of *Assets Company, Limited, v. Bain's Trustees*, decided on 28th May by the Second Division with three consulted judges from the First Division (41 Sc. L. Rep. 517). The judgment was that of a bare majority, and if we add the Lord Ordinary to the minority, we have four out of eight judges on each side. The action was at the instance of the Assets Company, Limited, against certain persons designed as surviving testamentary trustees of the

now deceased William Bain, sometime Manager of the City of Glasgow Bank in Edinburgh, and thereafter joint cashier of the Bank of Scotland there, and also against certain other persons stated to be beneficiaries under Mr. Bain's settlement "for any interest they may have." The summons concluded for reduction of an interlocutor of the First Division, dated 18th March 1879, sanctioning a compromise carried out by the liquidators of the City of Glasgow Bank with Mr. Bain, who was a shareholder of the ill-fated concern, and also for payment by the trustees of Mr. Bain to the pursuers as assignees of the Bank and its liquidators of the sum of £63,787 : 13s. 4d., being the amount of calls due by Mr. Bain as a contributory. The pursuers averred that in connection with the compromise referred to, Mr. Bain made a declaration that certain printed queries provided by the liquidators had been correctly answered by him "to the best of his knowledge and belief," and that these queries had not been correctly answered, in respect that he had fraudulently understated his existing effects by omitting two promissory notes for £300 and £200 respectively. It was explained in defence that these were advances by Mr. Bain to his sons to account of their patrimony, given long before the failure of the bank, and that though promissory notes were *pro forma* accepted for the payments they were not considered by Mr. Bain as part of his estate. After the action was raised, but before the record was closed, the Assets Company discovered another sum which they alleged should have been included in his statement, viz., the interest of his wife in the estate of her deceased father, but it was clearly shown in evidence that, although the law as it stood at the date of the succession vested the amount *jure mariti* in Mr. Bain, he never understood that he had any right to the money which was still under the charge of his father-in-law's trustees. In view of these facts, it was strongly argued that no fraud or even conscious

concealment had been proved on the part of the deceased in regard to the facts leading to the compromise.

Three points of law were involved: (1) Was the action rightly directed against the trustees of Mr. Bain, seeing that the trust had long since been wound up, and the trustees formally discharged by the beneficiaries "of their whole actings, transactions, intromissions, and management?" (2) Assuming the action to have been properly brought against the trustees, were the pursuers barred or estopped by *mora* and taciturnity from calling in question the validity of a compromise made many years previously? and (3) Assuming both preliminary pleas to be repelled, had sufficient ground been shown for setting aside the transaction and reviving the whole debt of £63,000. The majority of the Court answered all the three questions in favour of the pursuers. The minority and the Lord Ordinary were agreed that the action was wrongly brought against the trustees; but Lord Kinnear differed from the others on the question of *mora* and on the merits of the reduction. Lord Young, Lord Moncreiff, and Lord Kyllachy (Ordinary), were in favour of the defenders on all the three points of law.

The question as to the validity of an action brought against trustees long after their duties and their responsibilities are supposed to be ended is a very grave one. The trustees in this case were discharged by the beneficiaries in 1888, but according to Lord Trayner such discharge had no effect in bringing the trust to an end, or in depriving the trustees of their character as such. Lord Kinnear's view seems more in accordance with true principle. Referring to the very absolute terms of the discharge, he says: "I am of opinion that this is in law a complete discharge which determines the liabilities of the trustees, and determines the trust. I entirely agree with the Lord Ordinary when he says that the trustees have long ceased to have any connection with the trust estate; that they are *functi officii*;

and that they have no longer any duty, or for that matter any title to sue actions or ingather assets. . . . It is a general rule of law that obligations are extinguished by discharge; the only creditors in the trust obligations are the beneficiaries; and accordingly it is familiar doctrine, recognised and carried out in daily practice, that when the trust is performed the trustees are entitled to be discharged by the beneficiaries, provided they are *sui juris*, and that their rights under the trust are absolute."

The question of *mora* is more intimately connected with the merits. As pointed out by Lord Moncreiff, "mere lapse of time, short of the long prescription of forty years, coupled with taciturnity, will not in general afford a defence to a claim by one who holds a liquid document of debt or has otherwise constituted his claim"; but his Lordship adds, "There may be cases in which the defence of *mora* and taciturnity will be sustained if it is shown that the creditor's delay has caused substantial prejudice to the other party; this especially holds if the claim requires constitution." Applying this principle to the present case, there was in existence a compromise and discharge of the original debt, and the debtor could not anticipate that he would, after a long period of time, be charged with fraud. He might very naturally have torn or destroyed evidence which would clearly disprove such a charge. The action was brought twenty-two years after the date of the transaction challenged, and twenty years after Mr. Bain's death, when the particulars of his inventory were open to the pursuers had they been of a mind to pursue the trustees at that date. Mr. Bain is dead; his wife is dead; of the four liquidators three are dead; of the four judges who sanctioned the discharge, three are dead. Private papers were not preserved, and friends whom Mr. Bain is said to have consulted are also dead. "Money," says Lord Moncreiff, "must have been spent which would not have been spent; engagements

must have been made which would not have been made; new interests in many ways must have arisen; in short, matters are not and cannot be now entire." On these grounds, Lords Young, Moncreiff, and Kyllachy were of opinion that the plea of *mora* and taciturnity should prevail, while the remaining five judges were of a contrary opinion.

The same three judges of the minority were further of opinion that, on the merits, the pursuers had no case. It was necessary in their view that fraud should be proved, but (in a moral sense at least) there was no fraud; at the most there was only an innocent withholding of information. For anything that appeared, the items which, in the view of the majority, should have been set forth in the schedule, may have been mentioned verbally to some of the deceased liquidators at some of the numerous meetings held between Mr. Bain and them. "I am not satisfied," says Lord Young, "and cannot affirm that Mr. Bain concealed anything which the liquidators were entitled to know. I think that, as the evidence stands, the presumption is rather the other way." Lord Moncreiff adverted to the fact that the proposal for a compromise came from the liquidators; that the questions, the declaration, and the discharge were framed by them; and that these documents should be construed *contra preferentes*. He also called attention to *City of Glasgow Bank and Liquidators against Assets Company* ([1883], 10 Ret. 676), in which, according to the rubric of the report, it was "observed that nothing short of a case of fraud would induce the Court to open up discharges in favour of insolvent contributories, granted by the liquidators of a company which was being wound up subject to supervision." In that case the liquidators unsuccessfully resisted a claim by the Assets Company to have the papers relating to surrenders transferred to them. The reason, in Lord Moncreiff's opinion, of the resistance by the liquidators was, no doubt, "that they feared that a limited company uncontrolled by

the Court would seek to set aside these transactions, which they had carried through with so much trouble and so much pain."

On the whole the judgment is to be regretted, not so much for the cruelty of its consequences to the parties affected, as on the wider ground that it upsets the foundations of the law relating to testamentary trustees, and will render it increasingly difficult to get responsible persons to act in that capacity.

R. B.

IRISH CASES.

It is fairly well settled that as between tenant for life and remainderman of leasehold premises in settlement, the cost of repairs *prima facie* falls upon the tenant for life. A rather interesting example of the way in which an attempt to disregard this principle may work a breach of trust and upset a contract of sale is given by *In re Waldron & Bogue's Contract* ([1904], 1 Ir. R. 240). Premises held under a lease containing a covenant to repair were settled on B. for life with remainders over. The premises were allowed to go out of repair, and the lessor brought an action on the covenant against B. and recovered judgment. Subsequently, the trustees of the settlement assigned the premises to T. in trust for Waldron: T. covenanted to expend £300 on the premises, being the amount of the judgment recovered against B., and to indemnify the trustees and B. against damages and costs under this judgment. T. then assigned the legal estate in the premises to Waldron, who put them up for sale, and Bogue entered into an agreement for purchase. On the title being disclosed, the purchaser's counsel took the objection that the assignment by the trustees to T. was in breach of trust, on the ground that the covenant to indemnify was an unlawful attempt to

throw on the *corpus* the costs of repairs which should have been borne by the tenant for life. The Court, on a vendor and purchaser summons, held in favour of this contention of the purchaser. There was authority enough on the main proposition, that the liability to repair is in the first instance on the tenant for life and not on the *corpus*. *In re Redding* (L. R. [1897], 1 Ch. 876), decided that "income" of a tenant for life of leaseholds means net income after providing for ground rent and repairs: and *In re Betty* (L. R. [1899], 1 Ch. 821) contains the definite statement "what the legatee (an equitable tenant for life under a will) must bear, is the obligation of the covenants which have to be performed by the lessee for the benefit of the lessor: these include rent *and repairs*." Inasmuch as neither the tenant for life nor the remainderman was represented on the present summons, it was impossible to displace this primary presumption of liability; and the Court was therefore bound to assume as between vendor and purchaser that the abstract did disclose a breach of trust, and that the purchaser's objection was fatal.

The duty as to carefulness incumbent upon a person handling or dealing with dangerous instruments (such as firearms) rises very nearly to a duty to take consummate care to prevent harm being caused to any person by means of such instruments. It involves not only responsibility for one's own acts, but will also include liability for even the unauthorized acts of third persons using the instrument, provided such acts ought reasonably to have been contemplated by the person originally having charge of the instrument as not improbable consequences of his own action in regard to it. These principles are well settled: but the very vagueness of the terms wherein they must be stated suggests that great difficulties may arise in applying them to facts. Cases falling within the principles, therefore, though seldom

The principle was accurately put by Fitzgibbon, L.J., in the Court of Appeal. "In the case of an injury which would not have happened but for the action of more than one person, no one of the several persons whose action led up to the injury will be answerable unless his action *caused* it; and it should be held to have caused it if a man of ordinary prudence, having regard to all the circumstances, ought to have anticipated the injury as a not improbable consequence of his action. If so he is responsible, notwithstanding that the injury would not have happened but for the independent act of a third party."

The case, of course, goes farther than *Lynch v. Nurdin* (1 Q. B. 27): it is distinguishable from *M'Dowall v. Gt. Western Ry.* (L. R. [1903], 2 K. B. 331) on the ground that in the latter case there was no original negligence in the way in which the dangerous thing (a railway waggon) was left by the defendants.

Whatever may have been the case before the Judicature Act, it is not at the present day a defence to an action for possession by a second mortgagee against the mortgagor, that the legal estate is outstanding in a first mortgagee who is not a party. This point, apparently uncovered hitherto by direct authority, is decided by *Antrim Land Co. v. Stewart* ([1904], 2 Ir. R. 357). The defendant bought a farm from his landlord through the Land Commission under the Land Purchase Acts: it was conveyed to him in fee by deed in 1886, and by the same deed the defendant mortgaged it to the Land Commission as security for the repayment of the purchase annuity. In 1901, the defendant mortgaged the farm to the plaintiff company by deed, subject to the previous mortgage. Under their power of sale, the plaintiffs sold the farm: and the present action was brought by the Company and the purchaser for possession. It was argued on behalf of the defendant that if a person having an equitable title

seeks to recover possession, he must make the person having the legal estate a party (citing *Allen v. Woods*, 68 L. T. 143). The Court, however, thought this clearly opposed to the plain construction of the Judicature Act. *Allen v. Woods* was a decision on its own special facts: there it was essential to the plaintiffs' success, in the circumstances, that an absent party should be declared a trustee; and this the Court naturally would not do.

If A. sells mineral waters of his own manufacture in a bottle embossed with B.'s registered trade mark, but bearing A.'s own label, A. has committed an offence under sect. 2 of the Merchandise Marks Act 1887, even without any proof of "passing off," fraud, or actual deception; and B. is entitled to an injunction to restrain such sale. This is the decision in *Thwaites v. M'Evilly* ([1904], 1 Ir. R. 310); and it would seem to be clear law once it is recognised that the section in question eliminates from the offence any question of deceit or fraud. The offence is defined by the section as consisting in "selling or having in possession for any purpose of trade, any goods to which any trade mark is falsely applied." It then lays down various conditions of exemption, of which the only one that could possibly be alleged to apply to this case is "proof that he had acted innocently." The defendant suggested that his affixing the label bearing his own name showed that he had no intention to deceive, and brought him within the exemption. But the Court of Appeal were of opinion that "innocently" only meant that the defendant was innocent of any intention to infringe the Act: and that he did not act innocently if he knew that he had applied to goods of his own manufacture the trade mark of another, and endeavoured to avoid the consequences by attaching a label bearing his own name.

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

Gold Coast Native Institutions. By CASELY HAYFORD. London: Sweet and Maxwell. 1903.

Mr. Hayford has written a book full of information and interest, and providing abundant food for thought. It deals with the history and institutions of the Gold Coast and Ashanti; our relations with the natives; the policy we have intermittently pursued; and the policy we should pursue. Mr. Hayford is well qualified to discuss these subjects. He prepared the brief on behalf of the Gold Coast Aborigines' Rights Protection Society in opposition to the Lands Bill of 1897, and also enjoyed for some years an extensive practice at the Gold Coast Bar. His views are, shortly, that these "settlements" are a Protectorate, not a Colony, and that the only way to develop trade, promote civilization, and attain the grand aim of building up an Imperial West Africa, is by and through the development of native institutions. His account of the native institutions is most interesting, and the completeness of these surprises us. Mr. Hayford has the highest opinion of the Gold Coast native, and considers he has a great future if allowed to develop on natural lines. His criticism of the policy pursued by the Colonial Office is not complimentary to its intelligence or to its knowledge; but we are glad to hear that the tower of strength to the British Government on the Gold Coast has been the confidence reposed by the natives in the judges of the Supreme Court and the Bar. This is as it should be. We can only conclude by recommending a perusal of this work, written by one who evidently is passionately interested in his subject, to all who take an interest in our Colonial Empire.

A Summary of the Law of Corporations. By HERBERT M. ADLER, M.A., LL.M. London: William Clowes & Sons. 1903.

This is, as it purports to be, a summary of the principles which apply to Corporations of all kinds, commercial, municipal, etc., and in ten chapters it treats of, first, the nature of a Corporation, then the evolution of Corporations, the different kinds of Corporations

and their classification, their creation, their internal government and external superintendence, their general capacities and incapacities, the doctrine of *ultra vires*, the liability of a Corporation for the acts of its agents, and the extinction and revival of Corporations. The last chapter deals with foreign Corporations. All this is contained in less than a hundred and forty pages of good print, so it is obvious that all statements are concise. Mr. Adler has, however, found space to deal adequately with, among others, such vexed questions as those which were raised in *Clark v. The Guardians of Cuckfield Union*, and which even the recent decision of the Court of Appeal in *Lawford v. The Billericay Rural District Council* has not quite settled. The summary strikes us as a very useful one, and we may conclude by citing the definition of "a Corporation" which Mr. Adler has composed with great care. "A Corporation is a legal personification under one name of several individuals or of a succession of individuals combined together for some purpose; it is capable of indefinite duration, and is endowed with certain rights and obligations, capacities and incapacities, which are distinct from those of the individuals composing it."

An Epitome of Company Law. By W. H. HASTINGS KELKE. London: Sweet and Maxwell. 1904.

Mr. Kelke has had considerable practice in writing epitomes, and understands well how to get the maximum of matter into the minimum of space, without being either dry or obscure. Common law is not easy to epitomise, and students should be grateful to the author for the great assistance he gives them. The selection of something like two hundred cases which he cites must have required much careful thought. We notice Mr. Kelke is wise enough not to attempt to define either promoters or directorship, though he does his best to describe them.

Reports of Rating Appeals. By WALTER C. RYDE and E. M. KONSTAM. London: Butterworth & Co. 1904.

This is a continuation of *Ryde's Rating Appeals*, and gives a selection of those cases decided during 1874—1904 at the hearing of which the Editors were able to be present and take notes. For the first time, cases heard at Quarter Sessions outside London are included, and much to the advantage of the reader, as he will say

after carefully perusing the most instructive judgments of the learned Recorders of Oxford and Exeter, in the cases respectively of *Oxford University v. Mayor, etc., of Oxford (No. 1)*, and *Devon and Exeter Constitutional Newspaper Company Ltd. v. Exeter Union*. The reports are divided into three parts; cases heard at London Quarter Sessions; cases heard at five other Quarter Sessions; and cases heard before the Superior Courts. An appendix gives cases heard by the London Quarter Sessions in 1904. The value of reports such as these to those who practise before rating tribunals is impossible to overestimate; as they supply law, precedents, and arguments. The only addition we can suggest is that in Part III references should be given to the authorised reports, when the cases have been there reported. It is perhaps a little curious that the only slip we have noticed, and that merely a verbal one, occurs, of all cases, in *Cartwright v. Sculcoates Union*.

English and Roman-Dutch Law. By G. T. MORICE, Grahamstown : The African Book Co. London : Butterworth & Co. 1903.

This is intended as a practical work for those who have to study or practise Roman-Dutch law, and the Author claims for it, that it is the only modern work which deals with Roman-Dutch law as a whole, bringing it up to date and incorporating modern decisions. We have no doubt of its value in that respect, but that which will most interest English lawyers will probably be the differences it points out between the law of England and Roman-Dutch law. We may mention a few. There are material differences in the transfer of both real and personal property. Prescription instead of working negatively by depriving of his remedy the person with an adverse claim, is a mode of acquiring ownership; but an undisturbed possession for a third of a century is required for that purpose. The English doctrine of *consideration* does not seem to have been adopted in South Africa. It is a rule of Dutch law that the amount of interest, including interest in arrear, may not exceed the capital sum. There are some important differences in the two laws as regards seduction and defamation. For instance, in Dutch law verbal defamation is actionable *per se* without proof of special damage; and justification is not a defence, unless the words were also spoken or written for the public benefit. There are some differences in Criminal law, such as there being a general period of proscription for crimes in Dutch law; conspiracy is not in itself a crime; the offence of false coining is confined to coin of the realm.

Williams on Vendor and Purchaser. Vol. I. By T. CYPRIAN WILLIAMS, LL.B., assisted by G. J. F. ISELIN, M.A., LL.M. London: Sweet & Maxwell. 1903.

This is the first part of a work undertaken by Mr. Williams for the use of conveyancers, and which is to be completed in two volumes. It begins with the incidents of a contract for the sale of land in order of time. The present volume deals fully and clearly with the making of the contract, conditions of sale, investigation of title, both generally and specially; effect of contract pending completion, and terminates with completion, or the acts to be performed from acceptance of title to execution of conveyance. As the Author explains, this book has been written from the standpoint of the present time. For this reason some subjects are treated at a length which would not be suitable to an ideal composition. As an instance, he points out that he has devoted a whole chapter to the subject of devolution on death and the death duties, which has been rendered necessary by the fact that the law on these subjects has been so lately recast, "that its interpretation has not yet been settled. whilst the questions which are raised by these statutes occur upon almost every title." The Author's profound knowledge of the law and wide experience are apparent on almost every page, and many useful hints are given as to pit-falls and difficulties occurring in practice. It is curious to observe how conveyancers have made a sort of law unto themselves, sometimes in spite of legal decisions, as the ignoring of the rule laid down by Wood, V.-C., in *Drummond v. Tracy*. A number of decisions are criticised; notably, the unfortunate case of *Bolton v. London School Board*, *In re Williams and Newcastle's Contract*, and *In re Cornwallis West and Munro's Contract*. All conveyancers should note the discussions on "the compound settlement," and the difficulty of making a good title under the Settled Land Act. Although in this last case, as Mr. Williams goes on to say in the next paragraph, "in practice, however, sales under the Settled Land Acts have been carried through without the slightest regard to this objection." He tries to urge on purchasers' advisers to make a better stand on their clients' behalf in regard to the stipulations on private sales; and particularly not to agree to the payment of the deposit to the vendor, or to the vendor's solicitor as his agent, but to a stakeholder: there is also some good advice with regard to the stipulation for payment of interest in case of delay of completion. We might also call attention to the conclusion the

learned Author has arrived at as to the advantage of official over private searches, in spite of the contrary opinion of Messrs. Elphinstone and Clark in their well-known work on Searches. There is much more we might call attention to if space permitted, but can only add that we rather miss an Index and Table of Cases. No doubt both will appear with the second volume, which is to deal with the position of the parties after completion; the avoidance of the contract; and remedies for breach.

The Trustee Act 1893. By F. G. CHAMPERNOWNE and HARRY JOHNSTON. London: William Clowes & Sons. 1904.

This is an elaborately annotated edition of the Trustee Act 1893 and the few other recent Acts relating to Trustees. Very great care and learning have been expended in efforts to explain the difficulties, old and new, connected with the subject, and the result is a valuable work. It begins indeed before the Act of 1893, as it deals with sects. 1 and 8 (the only unrepealed sections) of the Trustee Act 1888; and the note on sect. 8 is not one of the least important in the work. Some of the sections which are annotated at the greatest length are sects. 1, 8 and 9, dealing with the important subject of investments; sect. 10 on the appointment of new trustees; sect. 12 on the vesting of trust property in new trustees; sect. 16, which deals with the difficult and rather unsatisfactory question of the position of a married woman as a trustee, where we notice that the learned Editors do not seem quite satisfied with the judgment of Farwell, J., in *In re West and Hardy*; sect. 22 on "Powers of two or more trustees"; and sect. 24 on "Implied indemnity of trustees." Other important notes are those on sects. 25 and 26 on appointment of new trustees; and sects. 30, 35, 42, 45, and sect. 50, which is concerned with definitions. A great many debatable questions remain undecided, and until there is another amending or codifying Act, and perhaps even then, the want of a book like the present will always be felt.

Master and Servant. Vols. I and II. Employers' Liability. By C. B. LABATT. Rochester, New York: Lawyers' Corporation Publishing Company. 1904.

These two handsome volumes, containing in all over 2,600 pages, are only part of Mr. Labatt's elaborate work, as there is to be a third volume, which is to complete the work, and deal with "Relation,

Hiring and Discharge, Compensations, Strikes, etc." The two volumes now issued are limited to "the nature and extent of a servant's right to maintain an action against his master for personal injuries," and lest their bulk should frighten away readers, we think it fair to give in the Author's own words his justification for the form his work has taken. "To some readers these volumes will perhaps appear inordinately prolix. It may be advisable, therefore, to take this opportunity of explaining that the great length to which they have been extended is due to the impossibility of discussing adequately within a narrow compass the enormous mass of authorities bearing upon a subject which may, without any exaggeration, be said to enjoy the unenviable distinction of having been the occasion of a larger number of conflicting doctrines and inconsistent decisions than any other branch of law. In order to show with something like reasonable clearness and precision the conclusions at which the various Courts have arrived, the Author has found himself constrained to enter upon a far more minute and detailed analysis of the cases than is customarily undertaken in a commentary of this general character." It should also be remembered that "it has been the Author's aim to cite every decision which has been rendered by a Court of review in any of the countries in which the Common law is the prevailing system of jurisprudence, and the materials collected represent the result of an exhaustive examination of all the reports, whether official, semi-official, or non-official, which have been published in the following countries: England, Scotland, Ireland, the United States, Canada, Australia, and New Zealand." Such an examination of cases as this entitles the Author to speak with weight on principles, and we are not surprised to find him severely criticising the two doctrines of "an implied assumption of risk" and "common Employment." To examine such a work as this in detail is impossible, and the most we can do is to give an idea of its general arrangement. After setting out the general principles determining the extent of the master's liability, the Author goes on to examine the degree of care a master is bound to exercise, what kind of instrumentalities he is bound to furnish, and how far common usage is a test of his performance of his duties. A chapter is devoted to the examination of the theory that the servant's knowledge or ignorance of the risks involved in the employment determines the existence or absence of culpability on the master's part. This theory is stated, exemplified, discussed and

criticised. The Author arrives at the conclusion that the right principle is "that it is a breach of duty in the master to keep his instrumentalities in such a condition that ordinary diligence will not always save a servant from injury." Further chapters deal with such questions as "knowledge as an element of a master's liability"; his duty, of inspection, employment of servants, to conduct the business upon a safe method, etc. Then comes the very important question of assumption of risks by the servant; contributory negligence of various sorts; and *volenti non fit injuria*. The second volume treats at great length on "common employment as a defence" and kindred subjects, and also deals with the statutes enacted expressly for the benefit of servants. These include our Employers' Liability Act 1880, and the American, Canadian, and Australian statutes modelled thereon. A chapter on the Workmen's Compensation Act 1897, and some chapters on Evidence, Pleading, Practice, and a short exposition of the employer's liability under the Civil law, and systems founded thereon, complete this part of the work. The Table of Cases cited will be found in rather an unusual position, namely, at the end of the second volume. As an able and elaborate examination of the principles of Employers' Liability, and a storehouse of the enormous number of cases decided thereon, systematically analysed, arranged and compared, this work should be most valuable both to the jurist and to the practitioner.

Second Edition. *The Education Act 1902.* By ERNEST A. JELF, M.A. London: Horace Cox. 1903.

This is a very useful little book, prepared with Mr. Jelf's well-known care. Its object is to explain the important enactment which has been added to the Statute roll, and that enactment only, though, of course, it has been necessary in so doing to refer to the earlier Acts. It consists of an introduction which first deals shortly with the Act of 1870, and some of the following Acts, and then proceeds, in rather less than forty pages, to explain the Act of 1902. Then comes the text of the Act with short notes; the Education (London) Act 1903, and some of the more important memoranda and circulars issued by the Board of Education.

Second Edition. *Pritchard's Quarter Sessions Practice.* By JOSEPH B. MATTHEWS and VICTOR G. MILWARD. London: Sweet & Maxwell. 1904.

There has been no new edition of this work for nearly thirty years, and it might be interesting to speculate on the differences in

the two editions. The present one consists of a handsome volume of over 900 pages, of which nearly 400 are devoted to Criminal Jurisdiction and Procedure. The effort has been as far as possible to limit its scope as regards Criminal Jurisdiction to Procedure, and accordingly the subjects of "Particular Felonies triable at Sessions," and "Parliamentary Misdemeanours triable at Sessions," which filled no less than 250 pages of the first edition, have been omitted. More space has been given to law as distinguished from practice in treating of the Appellate Jurisdiction; but, of course, no attempt has been made to deal exhaustively with such subjects as Poor Rates. We have looked into a good deal of the book, and it seems to us to be thoroughly well done, and should form a very useful work of practice at Quarter Sessions. There is a praiseworthy but scarcely successful effort in an Appendix to show that *Reg. v. Collins* has not been overruled; but as Lord Coleridge says, in *Reg. v. Ring*, that it was the opinion of nine judges that it had been wrongly decided, we are afraid that it would be hopeless now to support it. In saying that "infancy seems no objection to being thus bound," *i. e.*, to give evidence, the learned Editors appear to have overlooked the decision of Day, J., in *R. v. Smith*.

Third Edition. *The Law of Meetings.* By GEORGE A. BLACKWELL, LL.B. London · Butterworth & Co. 1903.

The number of meetings increases daily, and it is important for the despatch of business that the laws relating to their conduct and control should be understood by those who attend them, and especially if they may have to act as chairmen. The powers of chairmen to regulate and adjourn meetings, and the proper course to pursue with regard to amendments, and amendments of amendments, are not nearly so generally known as they should be. We advise anyone who may be anxious to discharge the duties of a chairman efficiently, to first buy, and then carefully peruse Mr. Blackwell's capital little handbook. He will there find complete instructions as to his powers and duties with regard to meetings in general, and in addition the Statutory Regulations and Rules, and the Standing Orders with reference to the meetings of County Councils, Town Councils, Urban and Rural District Councils, Boards of Guardians, Parish Councils, Parish Meetings, Vestry Meetings, Local Education Authorities, and Incorporated Companies.

Third Edition. *Private International Law.* By JOHN ALDERSON FOOTE, K.C. London: Stevens & Haynes. 1904.

This edition is considerably enlarged, although the Author "has made no attempt to extend the space allotted to foreign jurists or to cite the American and Continental cases," but the number of important cases that have been decided in the last twelve years form a sufficient excuse, if one should be needed. *Private International Law* treats on subjects of great difficulty and importance, and raises many points which can scarcely be considered as definitely settled. Mr. Foote's examination of these subjects is most careful and learned, and we doubt if a better guide can be found amid the perplexities to which the questions of domicile, *lex fori*, and *lex situs* often give rise. He points out the unsatisfactory condition of the English law on the subject of *capacity*, "a state of things for which the loose and inaccurate extension of the term beyond its proper meaning is perhaps responsible." He goes on to say that "on the question of *capacity* in the strict sense of the term, *i.e.*, the capacity of a sane adult to do a lawful act, the English authorities are scanty, and even discordant," and criticises the *dictum* of the Court of Appeal in *Sottomayer v. De Barros*. There is an interesting discussion on the immunities of ambassadors, and it is worth noticing that, though ambassadors or ministers are by International law exempt from being sued in the Courts of the State to which they are accredited, "there is no English authority expressly extending this authority to the inferior members of the legation, or to their families, suites, and servants; but it is so extended by writers on International law." On a considerably debated point as to what law of proscription is to be followed in regard to immovables, it is submitted that in the majority of instances it will be *lex rei situs*. Another submission of some importance is, that in cases of *devises* of English land the question of the legitimacy of *devises* should be referred to the *lex domicilii*. In the chapter on Procedure Mr. Foote justifies the proposition established by the English decisions, that the term of limitation of an action on an obligation depends upon the *lex fori*, against the strictures of Professor Westlake. The long dispute as to whether a foreign judgment is conclusive as to facts is related, and the present law is cited from the decision of Blackburn, J., in *Godard v. Gray*. We have called attention to a few of the interesting and important points which are so ably and carefully considered in these pages, and we

must also call attention to a few clerical errors which we have noticed. We think at the bottom of page 240 *lex domicilii* must have been intended for *lex loci*. The case of *In re Johnson, Roberts v. Attorney-General* is put down to the future year 1933. On page 434, in the last paragraph, there seems to be the word *surety* once too often. In the quotation from Blackburn, J.'s, judgment in *Schibsy v. Westenholz*, the words "resident in the country" have been omitted after the words "Again, if the defendants had been at the time when the suit was commenced"; and on page 565 the word "case" is omitted in referring again to *Schibsy v. Westenholz*.

Fourth Edition. *Goodeve on Personal Property*. By JOHN HERBERT WILLIAMS, LL.B., and WILLIAM MORSE CROWDY, B.A. London: Sweet & Maxwell. 1904.

This is one of the best-known books on personal property, and though intended primarily for students will often be found useful to practitioners. Although there have been few statutes passed affecting the law of personal property since the last edition, yet the Companies Act 1900 has considerably affected one chapter, and there have been important decisions on various subjects, such as *Walter v. Lane* on Copyright, which have had to be considered and noted up. The scope of the work does not often permit of long discussions on doubtful points, but the law throughout is laid down clearly and accurately. The Editors naturally congratulate themselves in having "by careful condensation succeeded in preventing any material increase in the size of the volume though much new matter has been added." We notice one feature, which is not often to be found in law books now, but which is very useful, especially to students, *i.e.*, a list of abbreviations. The Appendix contains the Wills Act 1837; the Wills Act Amendment Act 1852; and parts of the Statutes of Distribution. There are also a few forms, such as a Bill of Lading, Charter Party, etc.

Fifth Edition. *Hunt's Boundaries and Fences*. By HENRY STEPHEN. London: Butterworth & Co. 1904.

Mr. Stephen declares in his preface that he has stated the law as he has found it in statutes and judicial decisions, purposely avoiding giving an opinion as to what should be, or should not be, the law.

We are rather sorry for this, as we think the opinions of writers on doubtful points of law, in the subjects of which they have made a special study, are of great assistance to those who may have to form an opinion on such points, but Mr. Stephen has been better than his word. The subject of Boundaries is full of interest and difficulties, and it is not surprising that the Table of Cases covers twenty-seven pages, and the statutes range from 4 Edw. I to 3 Edw. VII. One of the most interesting chapters is the one dealing with the Sea-shore and Rivers and Lakes. It is there stated that "in England and Scotland the soil of public navigable lakes does not belong to the Crown, but to the owner of adjoining lands, subject to the public rights of navigation." We do not know why no mention is made of Ireland here, as the law would seem to be the same there as in England, and, in fact, the leading case on the subject, *Bristow v. Cormican*, is an Irish case, and is given as an authority in a further part of the paragraph we have quoted. There is a little slip in the citations of this case, which are given as 3 App. Ch., instead of 3 App. Ca., as it is correctly given in the Table of Cases. We also find no mention of the Poor Law Amendment Act 1868, the twenty-seventh section of which deprives the case of *M'Connor v. Sinclair* and the *Ipswich Dock* case of most of their importance. As indicated in the preface, particular attention has been paid to the powers of County and District Councils with regard to Boundaries; a point of considerable importance. We notice an error in the last chapter when dealing with "Larceny of fences and malicious injuries thereto." It is there stated that by the Criminal Law Consolidation (Malicious Injuries to Property) Act 1861, persons unlawfully and maliciously cutting, etc., fences are subject to the same penalties as are contained in sect. 34 of the Larceny Act 1861—that is, a fine of not more than £5 over and above the damage done for the first offence, and hard labour for not more than twelve months for the second offence. The paragraph goes on to say, "and the like penalties may be inflicted on persons doing any malicious injury to sea and river banks, and to works on rivers, canals, etc." As a matter of fact, the punishment for these last offences, as laid down in 24 & 25 Vict., c. 97, ss. 30 and 31, the authority referred to, may be as much as penal servitude for life under the first, and seven years penal servitude under the second of the said sections.

Fifth Edition. *Collisions at Sea.* By R. G. MARSDEN.
London: Stevens & Sons. 1904.

The present Edition has by judicious excision and the use of a larger page been kept to much the same size as the last one, although the recent English cases, and some American cases have been added, thus increasing the usefulness of what we believe to be the only recent English work entirely devoted to this important subject. Some of the cases added are interesting, such as *The Harmonides*, which decided that in the case of a ship of special construction and value to the owner, though of little market value, the damages must be arrived at by considering her value to the owner as a going concern at the time of her loss. The case of *The Veritas* should go far to decide the doubted point whether lien attaches where a collision takes place within the body of a county. Mr. Marsden has somewhat altered his summary of the result of the cases on the effect of contributory negligence. As the Regulations of 1897 had only been issued a short time before the publication of the last edition, there are several new cases to be found on them. Another addition to the present volume are some additions to local rules, etc. The differences between our law and that of foreign countries on the subject of Collisions, which has been the subject of so much discussion, is, of course, constantly referred to. We have noticed one small misprint, the citation on page 279 of *Reg. v. Barnett*, 2 C. & K. 393, should read *Reg. v. Barrett*, 2 C. & K. 343.

Seventh Edition. *Coote's Law of Mortgages.* 2 Vols. By
SUDNEY EDWARD WILLIAMS. London: Stevens and Sons. 1904.

In 1822 Mr. Coote published a small volume on Mortgages. The two volumes before us contain something like 2,000 pages. The Table of Cases alone runs into 170 pages and the Index into more than 200. 'This gives some idea of the importance of the subject treated, and the masses of law that have clustered round it. We are glad that Mr. Williams has issued his edition under the name of the original author, which had been dropped by Mr. L. G. Robins in the previous one. No new edition of any important work on Mortgages has been issued since 1897, and, considering that both the Land Transfer Act 1897 and the Land Charges Act 1900 have been passed since that date, the desirability of such an issue is manifest. The present Editor is hardly complimentary to his predecessors

when he says in his preface, speaking of inaccuracies, that "It is hoped that the present work will compare very favourably with the preceding editions." We have not to express any opinion on preceding editions, but as far as we have been able to examine a work of this size it strikes us as a piece of very careful and sound work. The first volume may roughly be said to deal with mortgages in general, and the rights, liabilities, and remedies of the mortgagor in particular; while the second volume mainly deals with the rights, etc., of the mortgagee. That volume also contains three chapters dealing with "Contract Securities (other than Mortgages) for Debts and Loans." There are Pledges, Hypothecations by way of Equitable Assignment, and Marine Hypothecations. The only Appendix is a short one on Stamp Duties. As a specimen of satisfactory dealing with an important branch of the subject, we may refer to the section of the twenty-ninth chapter which treats on "Mortgages to Trustees." There are about thirty pages there which every trustee might profitably learn by heart for his own protection.

Eighth Edition. *The Student's Conveyancing.* By ALBERT GIBSON and WALTER GRAY HART, LL.B. London: *Law Notes Publishing Offices.* 1904.

This treatise is designed for the use of candidates at the examinations of the Law Society, but, like all well-written students' books, it is calculated to be of use to those who are more advanced. The primary cause of this new Edition is the issue of a new code of rules under the Land Transfer Acts, which involved the re-writing of the chapter dealing with Registration of Title. That of course was absolutely necessary if the book was to retain its position. We see by the preface that the chapter on Wills has been re-written so as to make it "simpler to read and yet sufficiently full for the purposes of the Student." The work is divided into two books. The first which deals with conveyancing at Common law is divided into eight parts, and proceeds in a logical manner to discuss the subjects of Vendors and Purchasers; Mortgages; Bills of Sale; Leases; Settlements; Wills; Miscellaneous Transactions; such as Deeds of Disclaimer, Release, Appointments, etc.; and last but not least, Costs. The law laid down is sound and so is the practical advice. We think the Editors are right in thinking the decision in *Want v. Campain* reasonable, but we agree with them that since the decision in *Chapman v. Browne* its authority must be considered

doubtful. The treatment of "Conveyancing under the Land Transfer Acts" is very good and clear, and can be perused with advantage by all who have to do with the said Acts.

Ninth Edition. *Company Precedents.* Part II. Winding Up. By FRANCIS BEAUFORT PALMER, assisted by FRANK EVANS. London: Stevens & Sons. 1904.

We have before expressed our opinion on Mr. Palmer's works on Company Law as being "beyond criticism," and therefore we do not propose to comment at length on the present volume. It completes the great series of Company Precedents, and deals with Winding Up Forms and Practice in the following order: Compulsory Winding Up; Voluntary Winding Up; Winding Up under Supervision; Arrangements and Compromises. It contains more than nine hundred forms; special must be his case who cannot find one to suit him! We notice a chapter, though a very short one, is devoted to "prosecutions of directors and others," where we find the order to prosecute made by Buckley, J., in the case of *The London and Globe Finance Corporation, Limited*. On the same page we notice a misprint; the reference to sect. 8 (7) of 1890 should be page 595 not 557.

CONTEMPORARY FOREIGN LITERATURE.

Diritto e Personalità Umana nella Storia del Pensiero. By Prof. GIORGIO DEL VECCHIO. Bologna, 1904.

This is an example of the transcendental legal philosophy so beloved by Italian jurists. It appears to be 'the inaugural' address of the professor at Ferrara. The point of it appears at p. 31, where the learned author adopts the somewhat obvious thought of Rousseau, that in the study of law great talents are less necessary than a sincere love of justice and a real respect for truth.

Moemu Kritiku. By P. KAZANSKI, Professor in the Imperial University of Odessa. Odessa, 1904.

This brochure—in the Russian language, being in English "To my Critic"—is a reply to a certain review of a previous work of the author's by Prof. Count L. A. Kamarovski, of Moscow. The whole discussion is in the nature of a personal altercation not very interesting to foreigners. The author complains that he never finds justice at the hands of his reviewer, and is goaded to a lengthy defence.

PERIODICALS.

Journal du Droit International Privé. 1904. Nos. III, IV. Paris.

Articles of singular interest at the present time are the discussions of the Russian law of prize of 1895 (p. 270) and the corresponding Japanese law of 1894 (p. 285). The former is the work of Prof. Kazanski, who has just been noticed in another capacity, the latter of M. H. Nagaoka, Attaché of the Japanese Embassy at Paris. An important decision is to be found at p. 417. There the Court of Cassation at Brussels held that the Court of Appeal at Brussels was wrong in declaring itself incompetent to give damages against the Government of the Netherlands. The ground of the Cassation decision was that where a State runs railways and canals for profit, and its running powers extend by convention into Belgium, the rights of Belgian subjects must be protected, at any rate where the violation of the rights takes place in Belgium. At p. 510 will be found the form of contract for Chinese labour in Sumatra and French Indo-China. It appears to be on lines very nearly identical with the form of contract which has recently been the cause of unusual political excitement in this country.

Deutsche Juristen-Zeitung. 1904. 1 April—15 June. Berlin.

Interesting articles are those on the protection of exhibits in international exhibitions (p. 384), on the question of capital punishment in Hungary (p. 397), and on the permanent effects of a century of the operation of the Code Napoléon, promulgated on 21st March, 1804 (p. 465). In a curious article, entitled "To eat his way to the Bar," Oberlandesgerichtsrat Simonson, of Breslau, corrects what seems to be the popular opinion in Germany, that an English barrister is qualified by eating a certain amount of dinners in a *Gasthaus*! The index for the half-year is most careful and valuable, and is a digest of law in itself. Some of the items give food for thought when compared with English procedure, e. g., the note on p. 82. It was there held that a judge, in the exercise of his *nobile officium*, could inform his mind as to foreign law by the notarial act of a foreign notary without oral expert evidence.

La Giustizia Penale. 1904. 16 March—1 June. Rome.

Note the case of false pretences (p. 425). The decision depended to a considerable extent on texts of Roman law as to *repetitio* and on

the dissertation of Stryck, *De Allegatione Propria Turpitudinis*. It was also held that where the prosecutor is *particeps criminis* he cannot recover as *parte civile*. On p. 598 is the report of a crime—attempted bigamy—not recognised by English law. The Supreme Court held that a married man who induced an unmarried woman to become betrothed to him was guilty of a criminal offence. In England he could hardly be convicted without something further, such as obtaining money or goods from her on the false pretence that he was unmarried.

JAMES WILLIAMS.

Books received, reviews of which have been held over owing to pressure on space:—Clement's *Law of the Canadian Constitution*; Lewis and Porter's *Law of Motor Cars*; *Handbook of Sewer and Drain Cases* (The St. Bride's Press); *English Reports*, Vols. 39–42; McNeil's *Bills of Exchange*; Wace's *Law of Bankruptcy*; Stockman's *Guide for Sanitary Inspectors*; Nicolas' *Formation of Companies*; Nathan's *The Common Law of South Africa*; Atlay's *Wheaton's Elements of International Law*; Munro's *The Digest of Justinian*; Pollock's *Expansion of the Common Law*; Pocock's *High Court Practice, Chancery and King's Bench*; Thwaites' *Student's Guide to the Common Law*; Higgins' *The Hague Conference*; Redgrave's *Factory Acts*; Harris' *Illustrations in Advocacy*; Roscoe's *Law relating to Easement of Light*; Minton-Senhouse's *Work and Labour*; Hart's *Law of Banking*; Bodington's *French Law of Evidence*; Hallilay's *Digest of Examination Questions*; Lawrence's *War and Neutrality in the Far East*; Mozley and Whately's *Law Dictionary*; Porter's *Laws of Insurance*; Stephen's *Digest of the Law of Evidence*.

Other Publications received:—*The Trans-Isthmian Canal* (University of Texas); Bridgwater's *The Poor Prisoners' Defence Act*; *Allahabad Law Journal*; *The Teaching of Sir Henry Maine* (Henry Frowde); Ilbert's *The Romanes Lecture, 1904: Montesquieu* (Henry Frowde); *Report on Copyright Legislation* (Government Printing Office, Washington); *Reports of American Bar Association*, Vol. XXVI.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Review of Reviews*, *Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*.

THE LAW MAGAZINE AND REVIEW.

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I.—A PLEA FOR A BETTER SYSTEM OF LEGAL EDUCATION IN THE PROVINCES.

AT the present time when the minds of all thoughtful men are turned to the important question of education, and when the minds of the members of the legal profession are especially turned to the question of legal education by the proposed new legal university and the new scheme of legal education recently established by the Law Society, I venture, with diffidence, to put forward, as a result of several years' experience in private tuition and public instruction in law, as well as actual practice, some suggestions as to the needs of provincial law students, and the best methods of meeting those needs.

There is, I feel sure, a strong desire on the part of many members of the legal profession, to improve as far as possible the status of their profession, and if any apology were needed for discussing a subject of such importance it is to be found in the fact that the present seems an opportune time for the purpose, since not only are there now large funds available for the purpose of legal education, but the attention of the profession is fixed on the question, and in the North of England three new universities have just been established, all of which have hitherto devoted some attention to the matter of legal education.

Let me at once make clear my position. What I have to say does not apply to the great teaching and examining bodies in London, nor to the Universities of Oxford and Cambridge, and only in a minor degree to students for the Bar, most of whom will gravitate to those centres. The class of students that I have in my mind consists principally of articled clerks, and such only of these as cannot see their way to take advantage of the excellent teaching to be found at the centres above named.

Speaking at a meeting held at the Hotel Metropole, Leeds, in connection with the Yorkshire Board of Legal Studies (Incorporated), on the 21st November, 1903, Mr. Butcher, K.C., M.P., said with reference to the funds above referred to:—"He thought there were two conditions which ought to be fulfilled in the allocation of the money. The first was that a large and substantial proportion of it should be devoted to the purpose of rendering accessible to members of the Solicitor Profession the better education of those who were going to study in that branch of the law. That, he believed he was right in saying, was certainly the view of the Attorney-General . . . The other condition was that some provision should be made for the encouragement of the study of the law in the provinces." ("Yorkshire Post," November 23rd, 1903).

Let us therefore consider shortly what are the present means of education accessible to articled clerks in the provinces. Firstly, every solicitor who takes an articled clerk is, by the terms of his Articles bound to teach him his profession, just as every master is bound to teach an apprentice his trade. The common form of Articles of Clerkship runs as follows:—"In consideration of the premises and of the sum of £ now paid by the father (or guardian) to the solicitor (the receipt whereof the solicitor doth hereby acknowledge) the solicitor hereby covenants with the father (or guardian) and also with the

" clerk, that he will accept and take the said clerk as his
 " clerk, and will *by the best means he can and to the utmost of*
" his skill and knowledge, teach and instruct, or cause to be
" taught and instructed, the clerk in the practice or profession of
" a solicitor of the Supreme Court."

To what extent is this obligation fulfilled? I do not think that I am doing an injustice to anyone when I say that, owing to a variety of causes, in many cases this obligation is not by any means fulfilled as it should be. The profession of a solicitor, so far as the training for it is concerned, has two aspects. Firstly, a practical side, and secondly, a theoretical side. As regards the former, the practical side, I have no doubt that the obligation is in most cases satisfactorily fulfilled. The articled clerk has the run of the office, and his opportunity of learning the practical side of his profession is limited only by the amount of business transacted in the office and by his own desire to take advantage of his opportunities. If he is willing to work no doubt plenty of office work will be found for him to do, in some cases too much.

But turning to the other, the theoretical side, the learning of those great principles of law which every solicitor is supposed to know, it will be admitted I think, by anyone acquainted with the facts, that an articled clerk's advantages under the present system are not at all what they ought to be. In many cases he is left to do his reading for his examinations at such times and in such manner as he can, without any supervision or guidance. As a rule, little or no attempt is made in existing circumstances on the part of his principal to give him assistance in his reading. I say this as the result of wide intercourse with articled clerks, with whom I have made a point of discussing the matter, not from any motive of making reflections on their principals, but simply with a view of obtaining information.

A well-known Yorkshire solicitor told me a short time

ago that when he was an articled clerk, his principal, who was a very conscientious man, used to take him and a fellow articled clerk an hour a day every day of the week (except Sundays) in their legal studies. In this way they went through all the subjects of their examinations, and neither he nor his fellow articled clerk had any difficulty in passing them. How many principals could now be found able and willing to do this? The number I apprehend would be small, and no wonder, since the standard of the Law Society's examinations has been raised (and rightly so) to such an extent of late years that there are comparatively few members of the legal (or indeed any other) profession, of twenty years' standing, who could now pass their examinations if they were called upon to do so over again. And therefore many principals cannot, if they would, render their articled clerks the assistance which they are, by their covenant, bound to give them. Some allowance must, of course, be made for the fact that these gentlemen have lost the examination habit, and in fairness it must be said that many principals are far too busy to spare the time necessary for preparing their articled clerks for examination. Moreover the art of teaching is a distinct gift, which few men possess, and even these require constant practice in order to keep themselves in form. This neglect of duty on the part of some principals would not be so bad if measures were taken by them to ensure that their articled clerks are properly instructed by others, but I am afraid they do not. Some solicitors, recognising their inability to do justice to them, decline to accept articled clerks.

When all allowances are made, however, it cannot be denied that there is great apathy and indifference on the part of many principals as to the necessity of training in the knowledge of the law, and this apathy is reflected in their articled clerks. In a letter to the "Times" newspaper of March 12th, 1904, Lord Davey says: "My experience as

“ an advocate for some years of higher legal education has
“ been that the chief obstacle to success has been the indifference to the subject shown by the general public, and
“ (I regret to say) by the majority of professional lawyers.”
Over and over again have I heard it said, both by solicitors and articled clerks, that a solicitor does not need to be a learned lawyer. All that is necessary is that he should be a good business man. In any case of difficulty or doubt he can always have recourse to Counsel. Let it be admitted that a solicitor need not be a Blackburne or a Cairns, it will, I think, be admitted also that the wider and deeper his knowledge of law, the better it will be for his clients and for himself, the greater probability there will be of his advice on any matter being sound, and the less likelihood there will be of his client having to pay heavy Counsel's fees at some future time.

What is the professional biography of the average articled clerk? He is usually articled about the age of sixteen or seventeen, immediately after he has passed his preliminary examination and left school. Perhaps his parents or guardians have paid a considerable premium for him to enter the office of a well-known firm of solicitors with a large practice. For the first year his services are of little value to his principals, not much more so in fact than those of a good office boy. He is set to copy documents containing technical terms with the meaning of which he is totally unacquainted, and which are to him so much gibberish. He is not as a rule a studious person, and in most cases there is nobody to give him a friendly hand and lift him over the stile by advising him what are the best books to read as an easy introduction to the study of law. In his second year he begins to be of some little use, having by a slow and painful rule of thumb process acquired some little insight into the work of the office and the meaning of the documents put before him. Towards the end of his second

year he suddenly becomes alive to the fact that he has presently to pass an examination, called the Intermediate, and he begins in frantic haste to prepare for it, often unaided and without advice of any sort except such as he can draw from tuition by correspondence or from Gibson's or Thwaites's *Guide to the Intermediate Examination*, excellent books of their kind, but which can never take the place of good *viva voce* teaching. Assuming that he scrambles through his Intermediate, after absenting himself from the office for some time in order to devote himself entirely to the work of preparing for it, and cramming the work of twelve or eighteen months into six or less, he comes back to the office for a period of rest, during which he does little or no reading, but endeavours to pick up again the threads of the office work, which he has meantime lost. He is now of such use to his principal that he is frequently kept constantly employed in office work, and for the next year or two he has little or no time for reading. Sometimes, in his fourth year, he goes up to agents in town; and there is a good deal to be said in favour of this course. He can then avail himself of the teaching to be obtained in town and at the same time see something of London practice. But it is not all articled clerks who can adopt this course. In many cases the parents have perhaps had to struggle to pay the premium and maintain the articled clerk for five years, and the extra expense of a year's residence in London is the proverbial last straw.* In such cases the articled clerk has to make shift to pass his Final examination by his own unaided effort, with the assistance again of tuition by correspondence or such chance coaching as he may happen to obtain in the country. Can there be any surprise that the results of such a system are so unsatisfactory, and that the examinations are looked upon as a nuisance and a bore and simply as an obstacle to money making, to be got over

anyhow, instead of being regarded, as they ought to be, as a fair test of the embryo-lawyer's knowledge and fitness to practise? Examinations may not be an ideal method of testing a man's knowledge and ability, but still they are the best practical method we possess, and, if properly conducted, they are a fairly satisfactory test. Whatever faults the method of examination has, it has this great merit, it demands and ensures a certain amount of reading by way of preparation from all the candidates, since no man can pass an examination in a technical subject like law by the light of nature. By the regulations now in force an articled clerk may present himself for his Intermediate examination when he has served one year of his articles, but comparatively few take advantage of this regulation. It is, however, very desirable that they should do so, as an articled clerk is not of much use to his principal, nor can he profit very much from the office work, until he has passed the Intermediate.

The result of the present system, or rather want of system, is that it still remains true that the knowledge of law possessed by the average English lawyer consists of "scraps and fragments," without any cohesion or symmetry. It is a purely empirical and so-called "practical knowledge." Comparatively few solicitors can tell a client what is the reason of the law, as well as what the law is, on any point; but there is a great deal of our law which can only be properly understood by one who knows the history of the rule or principle in question as well as the rule itself. They pride themselves on being "practical men," but practice and theory should go hand in hand. Of course there are many honourable exceptions to this statement, and the number of solicitors who are really good lawyers is becoming greater every year, in spite of the system. It is characteristic of Englishmen that in most departments of life they rise superior to their opportunities and turn

out better than might be expected considering their inadequate training.

Another evil connected with the present mode of education of articled clerks is, that while they are still raw boys they are sent to attend Quarter Sessions and Assizes, as well as County Courts and Police Courts, ostensibly for the purpose of gaining knowledge and experience in advocacy. But what is the good of sending them to these places until they have acquired a sufficient knowledge of law to appreciate the issues involved in the cases they hear, and to take an intelligent interest in the way the advocates deal with those issues? The consequence is, they hang about the corridors and congregate in shady places in the vicinity of the Courts, frequently forming associations of a very undesirable character, and only listen to the worst class of cases. To my own knowledge some youths of good natural disposition and ability have been ruined in this way, by being sent to Sessions and Assizes. A better system for corrupting boys could hardly be devised than that of constant association with the sordid details of our Criminal Courts. Attendance at Court is of course a necessary part of the training of articled clerks when they come to years of discretion. My point is that, as a rule, they begin to attend the Courts too early.

Contrast this system of professional education with that of the average medical student. By law he is bound to attend classes and lectures at some recognised Medical School for the same period as the articled clerk, *viz.*, five years, without, I believe, any exemptions. During this time he receives instruction, always from competent, and frequently from eminent teachers, both in the theoretical, or scientific, and practical branches of his profession. Before he can present himself for examination he must get "signed up" as having attended a certain number of lectures, classes, or demonstrations in each subject. There is no opportunity

for idling. He is kept busily employed on some subject, either practical or scientific, during the whole time, so that he receives a regular, well-ordered, and scientific course of training, which shows itself in its results. I do not think that I shall give offence to the members of the legal profession (certainly I have no intention of doing so) when I say, as I must, from an extensive acquaintance with members of both professions, that the average young medical practitioner is a better educated man, professionally, than the average young lawyer, that he has a more thorough knowledge of his profession, a higher ideal of it, and a greater love for it, all which seem to spring from the fact of his better training, since he does not, as a rule, come from any higher stratum of society, nor has he received any better school education. It may perhaps be said that solicitors' offices and the Law Courts are to the articled clerk what the dissecting room and the hospital ward are to the medical student; but the fact remains that while the theoretical part of the articled clerk's training is much neglected, that of the medical student is well provided for.

Some effort has been made in the past to recognise and remedy this state of affairs, but so far it has been but partial and incomplete, owing in a large measure to the singular apathy on the part of the members of the legal profession above alluded to. Many solicitors unfortunately still think that the system which has been good enough for them is good enough for all who will come after them, regardless of the increased severity of the examinations and of the fact that a higher standard is now required in all professions.

The pioneers of legal education in the provinces (and it is only right that the fact should be acknowledged) were, I believe, the authorities of Owen's College, Manchester, now the Victoria University of Manchester. They were followed at a later date by the authorities of the University College, Liverpool, now the University of Liverpool: and at a still

later date by the Yorkshire Board of Legal Studies (Incorporated), which, about five years ago, established the Law Department of the Yorkshire College, Leeds, now the University of Leeds. These three institutions formed the constituent colleges of the Victoria University (now unhappily disintegrated), and the students who attended the classes at these institutions had the privilege of presenting themselves for the Law Degree of the Victoria University, in addition to preparing for the examination of the Law Society. The Yorkshire Board of Legal Studies has also had a teaching branch at Hull, in connection with the Yorkshire College; and the Sheffield Incorporated Law Society has had a tentative scheme of its own, in connection with the University College, Sheffield. A Board of Legal Studies somewhat similar to the Yorkshire Board has recently been formed in the West of England. The University College of Wales, at Aberystwyth, has also a Law Faculty; but the University of Birmingham has not yet established one. This, I believe, is the only provision that has been made so far for the education of law students in the provinces. The work of these Colleges is, however, confined to a comparatively small area. The Yorkshire Board of Legal Studies has received generous support from the Law Society, and would, no doubt, receive more, if that Society were supported as it ought to be by the Yorkshire solicitors themselves, of whom about only one-third are members of it.

It is obvious that what has been done so far is not nearly enough. What is really needed is that local centres should be established all over the country, under the auspices of the Law Society and the various local Law Societies, on the model of those law schools already founded at Liverpool, Manchester, and Leeds (the benefits of which can be testified to with gratitude by a large number of former students now in practice), and that articled clerks should

be encouraged by every possible means to attend a certain number of classes at such centres. Where it was impossible for an articled clerk to attend the classes at the nearest centre, by reason of its distance from his place of residence, he should be encouraged from time to time to give an account of his reading to the teacher at the nearest centre, to work under his guidance, to read such text books or parts of books as he recommended, and to answer test papers periodically, with an occasional interview, say once a month. These centres, if properly conducted, would be centres of light and learning, radiating in all directions. I do not think there would be any difficulty in finding competent men to take charge of them and to do the work for fair remuneration: and I believe that those principals who have articled clerks, if the matter were fairly put before them, would gladly pay a few guineas a year to be relieved of the duty and responsibility of preparing their articled clerks for examination. The benefit of a systematic course of study under a competent teacher and guide are admitted to be very great. While it is always possible to respect a self-taught man, it is not always possible to admire him. The result of such a system as that above described would be that articled clerks would spread their reading over a greater period, master it more thoroughly, and digest it better. The course for the Intermediate examination should be extended over at least one year, and that for the Final over two years. As far as possible the teachers should be men in touch with practice.

I do not suggest that the system should be made compulsory—that is at present, unfortunately, impossible. The Law Society has not the same control over legal education as the General Medical Council has over the education of medical students. Moreover, it would not be possible to establish such centres within easy reach of all articled clerks. Something might, however, be done in the way of

encouraging them to attend such centres by payment of part of their travelling expenses. The Yorkshire Board of Legal Studies pays half of such expenses. Students from places as far distant as Stockton-on-Tees have attended the classes at the Yorkshire College. In the present state of affairs, therefore, such a system could only be carried out by the hearty and enthusiastic voluntary co-operation of all members of the legal profession, especially those who have articled clerks. Is it asking too much of these gentlemen to recognise to a greater extent the duties they owe to their articled clerks? I would appeal to their sense of honour and to their pride in their profession. Some solicitors in Yorkshire are so convinced of the benefit of a regular systematic training, that they have inserted a covenant in their articles of clerkship that their articled clerks will attend such a course of lectures and classes as their principals may prescribe.

The great points to be aimed at are, to make the reading of articled clerks more systematic, to induce them to spread their reading over a greater period, and so avoid mere cram, *i.e.*, superficial knowledge hastily acquired merely for the purposes of examination. This can only be done by affording them opportunities of pursuing their studies under the eyes, and with the assistance, of experienced teachers.

One great advantage of spreading their reading over a greater period would be, that articled clerks would devote more attention to the historical aspect of English law. At present all their attention is concentrated on its purely practical aspect, because they do not give themselves time for anything else. But in the opinion of many whose opinions are entitled to great weight on this matter, the historical method is the proper and the best method of studying law. It has been well said that the "roots of the present lie deep in the past," and it is quite impossible to appreciate many of the modern rules of English law without

knowing and being able to trace, step by step, the process by which they assumed their present form. Our law has been profoundly influenced by social changes, and its history reflects the growth of English society. Moreover, if English law is not studied historically, it is deprived of more than half its value as an educational factor. If more attention were given to the history of English law we should not come across cases of wills, drawn by solicitors, in which the clause "in restraint of anticipation" is applied to a young man. Again, how many solicitors, even among those who practise in our Criminal Courts, know why it is that after a prisoner is convicted he is asked, what he has to say why sentence should not be passed upon him? The explanation of both these matters is to be found in the history of our law.

Various opinions are held as to the best method of teaching law. The usual course adopted is that of formal lectures, leaving the students to take notes in their own way of what the lecturer says, as he proceeds. There is a good deal to be said in favour of this plan, as it involves, on the part of the student, the mental process of rapidly recasting in his mind the substance of what the lecturer says, and expressing it in his own language in the form of short notes, which is a valuable mental discipline. But this is a process at which all students are not equally adept, and when such is the case, unless they happen to be quick writers, a good deal of what the lecturer says is lost, particularly in regard to the details, and only a confused impression is left on the minds of the hearers. It is the average student who requires most assistance and consideration. The exceptionally able man will make his own way in spite of difficulties. If, on the other hand, the lecturer simply dictates his notes, that is perhaps the fairest method to all members of the class, but it involves no mental process and therefore no discipline on the part of the student. He has, however, at the end of the

lecture, a copy of good clear notes which he may digest at his leisure. Lectures should not, however, be allowed to take the place of text books. Some teachers adopt the less formal, more easy and familiar, method of question and answer. The great danger of this method is, that the discussion is apt to branch off into by-paths, and thus a great deal of time is wasted. Besides these methods of oral instruction great benefit is sometimes derived from the setting of frequent test papers, and afterwards discussing with each student the points of his answers. There is also much to be said for the practice of holding moots, which seems almost to have fallen into disuse in England, though it is largely adopted in the American law schools. It is, however, to some extent adopted by law students' societies. The truth appears to be that all these different methods of instruction are of value, and the question which can be adopted with the most advantage depends upon the subject and upon the temperament of the individual student and teacher. Different subjects require different methods of treatment.

Moots are of special value, because they generally necessitate the looking up of a point of law and the consideration of a series of judicial decisions thereon. Students should be encouraged to consult the authorities, both statutory and judicial, for themselves, and for this purpose they cannot too early make the acquaintance of the *Law Reports*, that invaluable mine of strong common sense, sound reasoning, and good English, a mine too, which, unlike all other mines, does not become exhausted by time, but grows richer year by year. This is the real value of moots, not only that they develop the power of public speaking, but that they develop the powers of thought and research.

So far I have been dealing with the matter solely from the view of articled clerks and solicitors. But there is also another and higher aspect of the question. To obtain a

university degree is a legitimate object of ambition on the part of every young man. University degrees have also a certain pecuniary value. They are good introductions to professional life, and not infrequently turn the scale in favour of applicants for public appointments. Every year an increasing number of university graduates is to be found joining the ranks of solicitors, showing that the social and intellectual status of that branch of the profession is rapidly advancing. There is also a certain number of students for the Bar to be found in the provinces, and a few students of law who do not intend to enter either branch of the profession. It must be admitted that the latter class is a very small one, and it is much to be regretted that it is so, since law is undoubtedly one of the greatest of human sciences and ought to form part of a liberal education. That it does not do so as fully as it ought is largely due to the fact that in the past law has been so badly taught, until it has come to be regarded as a dry and unattractive study, and is therefore unpopular; whereas, when properly taught and studied, English law is a subject of absorbing interest. Long ago Gibbon declared that "the laws of a nation form the most instructive portion of its history," and the late Mr. Justice Stephen used to declare that the English people had yet to learn that their own law was one of the most fascinating studies in the world. That the study of law in England as a science is reviving, is shown by the increasing number of men who take law degrees at all the universities.

It is the earnest hope of many members of the legal profession that the law schools of the new universities in the north of England will receive generous support from the Law Society and the various local law societies. May I venture to make a few suggestions which, it appears to me, would have the effect of rendering the law schools at these places more in accordance with the needs of provincial law students, and at the same time rendering them more popular?

In so doing I wish it to be understood that I am speaking only for myself, though I believe that I express the views of many others with whom I have talked on the subject.

Broadly speaking, I would entirely alter the usual course for the degree of LL.B. At present, at most universities, this consists of two examinations after matriculation, *viz.*:—the Intermediate, comprising principally Jurisprudence, Roman Law, and Constitutional History; and the Final, comprising principally English Law. The Intermediate is usually taken at the end of one year after matriculation, the Final two years later.

In the first place I would abolish the distinction between the Intermediate and the Final examinations, and make the course consist of two parts of about equal difficulty, and I would reverse the order in which the subjects are taken, and in most cases take the English Law first.

Part I (or the English Law Part) should consist of five papers, embracing the following subjects:—

1. The Law of Real and Personal Property, including Conveyancing and Succession.
2. Common Law, including the Law of Contracts, Torts and Criminal Law, and outlines of Procedure.
3. Equity and Procedure in Equity matters.
4. Probate, Divorce, Admiralty and Ecclesiastical Law, and Procedure therein.
5. Constitutional Law and Legal History.

Part II (or the Scientific Law Part) should also consist of five papers, *viz.*:—

1. Jurisprudence.
2. Roman Law (Gaius and Justinian).
3. Public International Law.

These three subjects should be compulsory. There should also be two special subjects (4 and 5) to be selected at the option of the candidate, from the following list :—

- i. The Elements of Logic, Psychology, and Ethics.
- ii. The History of Roman Law and a portion of the Digest.
- iii. Private International Law, or the Conflict of Laws.
- iv. The Law of Trusts.
- v. The Administration of the estates of deceased persons.
- vi. Mortgages.
- vii. Specific Performance of Contracts.
- viii. Partnership.
- ix. Company Law.
- x. Bankruptcy.

Each of these Parts, as I have said, should consist of five papers, and students should be expected to attend classes in all the subjects for not less than one hour per week in each subject, with a minimum attendance of three hours a week, for two academic years, before presenting themselves for examination. Surely this would not make too great demands on the time of articled clerks, or keep them away from the office too much. Two years are now allowed for each part of the Law Tripos at Cambridge, if a student thinks fit to extend his reading over that period, and there he has no office work to attend to, but is free to devote the whole of his time to his reading. As regards Part II, however, if any difficulty were experienced as to the provision of lectures in the optional subjects (the list being so long it could hardly be expected that suitable lectures could be provided in all these subjects), I see no reason why, in the case of young practitioners, they should not be excused attendance at lectures on the optional subjects. It would no doubt be a relief to them to have fewer lectures to

attend; and having attended lectures for Part I, it may be assumed that they would have learnt proper methods of work, and might be trusted to get up the optional subjects which they had selected by themselves. In this case, therefore, attendance at lectures should be required only in the compulsory subjects.

It will be observed that the subjects of the first part are practically those of the Solicitors' Final Examination, with the addition of Constitutional Law and Legal History, and cover the whole field of English Law. A student of fair abilities, who had attended the classes regularly and read the prescribed books, would have no difficulty in passing the Solicitors' Final if he could pass the examination for this part, the standard of which should be well above that of the Solicitors' Final. He would thus kill two birds with one stone. He would at the same time prepare himself to pass the professional examination, his primary object, and at the same time pass one part of his examinations for the LL.B. degree.

I assume that the articled clerk would pass the Solicitors' Intermediate Examination before beginning to read for Part I. For this purpose a class should be held (as it is at the present at the Yorkshire College) in the subjects of the Intermediate Examination, *viz.*:—Stephen's *Commentaries*. This class is held twice a week, and the course extends over one year. It is called the Elementary English Law Class.

A student who did not intend to take the degree need not take Part II, the subjects of which are chiefly scientific. This part would afford any student who wished to make a special study of some particular branch of English law an opportunity of doing so, since he would have the option of choosing two of his subjects from English law. It might also form an alternative final examination for those students who wished to graduate in Arts but to make law part of their course. For such students the English law of Contract

and Criminal Law might be allowed as optional subjects. No student, however, should be allowed to proceed to the degree of LL.B., unless he had passed both parts.

The course for a student who was intending merely to become a solicitor, and *not* to take a law degree, would therefore be as follows:—

1. The Preliminary Examination of the Law Society, or some equivalent examination conferring exemption.
2. The Elementary Law Class as a preparation for the Solicitors' Intermediate, to be taken at the end of his first or second year.
3. The classes for Part I, as above, to be taken at the end of his fifth year.

The course for a student who was intending not only to become a solicitor but also to take a law degree, would be as follows:—

1. The University Matriculation Examination, which would no doubt excuse him from the Solicitors' Preliminary.
2. The Elementary Law Class and the Solicitors' Intermediate Examination, at the end of his first or second year.
3. Part I, at the end of his fifth year, at the same time as his Solicitors' Final.
4. Part II, at the end of his seventh year, or at his convenience.

This induces me to say a few words about the Solicitors' Preliminary Examination. It is generally agreed that this examination is far too easy and that the standard ought to be considerably raised. Against this it is urged that to do so would exclude some deserving candidates, *viz* : managing

clerks, whose articles are sometimes given to them as a reward for faithful service, and who cannot be expected after some years of active life to pass a severe scholastic examination; but the number of these cases is comparatively small, and such candidates are usually granted indulgence as to their period of service under articles, *i. e.*, if they have been engaged in the practical work of the profession for ten years or upwards they are bound to serve only three years under articles; and if indulgence is shown to them in this respect they might as well be treated with indulgence in other respects, *viz.* as regards the Preliminary Examination, in fact they are sometimes excused from that examination altogether.

All candidates for the degree would of course be required to pass the Matriculation examination of the University; this would be necessary, not only because they would be candidates for a university degree, but also because a fuller knowledge of Latin would be required by them for the reading of Roman Law, and because a university graduate is expected to have a better general education.

I said above that it would be better to call the two parts not the Intermediate and the Final, but Part I and Part II, better still the English Law Part and the Scientific Law Part. Although I have suggested that Part I should be taken first, I would not make this a hard and fast rule. If any candidate wished to take Part II first, he should be at liberty to do so. A diligent student might without difficulty obtain both his qualification and his degree within five years, in which case his course would be as follows:—

1. The Matriculation examination.
2. The Elementary English Law Class and Solicitors' Intermediate Examination, at the end of his first year.
3. Part II, at the end of his third year.
4. Part I, and the Solicitors' Final, at the end of his fifth year.

The great point is to make Part I fall about the same time as the Solicitors' Final. Thus he would both become qualified as a solicitor and obtain his degree within five years. The number of hours he would have to attend classes would not be excessive, only five hours a week (with a minimum of three) for four years, and would not seriously detract from his office work. Moreover, the academic year only lasts about thirty weeks.

It may perhaps be objected to the scheme sketched out above, that inasmuch as the Solicitors' Final Examination falls at the end of his period of articles, *viz.*, at the end of his fifth year, if he had to work two years more for Part II, in order to get his degree, the candidate's student life would extend over seven years. The answer to this objection is twofold. Firstly, the bulk of the students would not proceed to take degrees. Secondly, one great advantage of the above scheme would be that it would act as an inducement to young solicitors, during the first few years of their professional life, when they are not as a rule overburdened with work, to carry on their reading and so obtain a university degree. Again, it must be remembered that the parts might be taken in either order. A lawyer ought always to remain a student. If he does not he will soon fall far behind in the professional race.

The scheme above sketched out approximates to the system of legal study in Germany, where most of the students, after a certain course of study at a university, pass their State Examination, which entitles them to practice, and then leave the university without taking degrees; while those whose means enable them to do so, and who intend to become teachers of law, or to qualify for Government appointments, stay at the university a year or two longer and take their degrees.

As to the general question of taking English Law before Jurisprudence, Roman Law, &c., *i. e.*, to take the parts as I

have suggested, I shall no doubt be told that it is contrary to the course of study in law prescribed by every university and teaching body. Thus at Oxford and Cambridge the theoretical subjects of Jurisprudence, Roman Law, &c., are placed in Part I (or in the Intermediate Examination), while English Law appears in Part II (or the Final). This is also the case at London University, and at the Inns of Court. The supposed reason for this is that these subjects form a sort of introductory study to the harder and graver subject of English Law, for which they are a training or preparation. They have an academic character and form a bridge between the classical and historical subjects taught at school and the more mature subjects taught at the university. But is there any valid reason for taking them in this order, beyond academic tradition, and the fact that it has always been customary to do so? *Non omnium, quæ a majoribus constituta sunt, ratio reddi potest* (Julian, D. i, fr. 32).

Let us consider first the subject of Jurisprudence. This subject is one that cannot be properly studied and appreciated as it ought except by one who has already acquired a considerable knowledge of at least one system of law. It is for this reason chiefly that the study of Roman law is taken up early, because it forms a groundwork for the study of Jurisprudence, and furnishes most of the technical terms employed in that subject. But is Roman law any better for this purpose than English law? Hear what Austin himself says—In his Essay on the uses of the Study of Jurisprudence (Vol. 2, p. 1114) he says, “For the following sufficient reason (to which many others might be added) the Roman or Civil law is of all particular systems *other than the law of England* the best of the sources from which illustrations might be drawn” (the italics are mine). Here by implication Austin clearly expresses the opinion that the English system of law is better than the Roman for the purposes of Jurisprudence.

There is a hazy notion that English law, because it is unsystematic in form, is not *per se* a good subject of education, while Roman law because of its perfection of logical form (*elegantia*) is a good subject for this purpose. In reply to this I would say that the value of every subject as an educational factor depends upon the way in which it is taught. In spite of a recent remarkable article in the "Spectator" of October 24th 1903, entitled "The law as an Intellectual Forcing House," in which the writer argues with considerable force that the study of English law has greatly declined as an intellectual training since the passing of the Judicature Acts and the abolition of the old Court of Chancery, *i. e.*, since the fusion of law and equity, much might still be said in favour of the study of English law alone as an intellectual training, but this is too large a subject to enter upon here. If any proof were required of the advantages of having a good knowledge of English law before beginning the study of Jurisprudence and Roman law, it is to be found in the fact that those who have come to the study of these scientific subjects equipped with such a knowledge, have usually attained great proficiency therein. Two notable examples may be mentioned, *viz.* :—Dr. Courtney Kenny, University Reader in English Law at Cambridge, and Mr. Edward Jenks, the Principal of the newly-established Law Society's classes, both of whom obtained high honours at the Solicitors' Final Examination before they went to Cambridge, where they were both seniors in the Law Tripos and Chancellors' Medallists.

Turning now to Roman law, nothing need be said to recommend the study of this subject, both as a mental training and an element in a liberal education. It is a deeply interesting subject, and semi-classical, being closely connected with the history of imperial Rome. It exhibits as a panorama the development of a highly technical and elaborate system of ancient law by a people who had a

genius for law and government. It is a great subject—so great indeed that Gibbon says of it, “It has exhausted many learned lives and clothed the walls of spacious libraries.” There is probably no subject in the world, except Theology, upon which so much has been written as Roman law. In two years, therefore, a student cannot hope to obtain anything more than an elementary knowledge of so great a subject along with others. Even an elementary knowledge of Roman law, however, is of great value for the purpose of comparison with our own system. Who would have thought that the Coronation cases, of which *Krell v. Henry* ([1903], L. R., 2 K. B. 740) is a type, all turn on a passage of Roman law. Yet we find Lord Justice Vaughan Williams beginning his judgment in the above-mentioned case (page 747) with these words: “The real question in this case is, the extent of the application in English law of the principle of Roman law which has been adopted and acted upon in many decisions, and notably in the case of *Taylor v. Caldwell*” (3 B. & S. 826), *viz.*:—*obligationes de corpore*.

Far be it from me to decry the study of Roman law; but there is a danger of attaching too much importance to it for the purposes of a practical English lawyer, and therefore only one compulsory paper is allotted to that subject in the above scheme. Comparatively speaking, but a small portion of English law is founded upon Roman law. That fact, however, makes the contrast between the two systems all the greater, whilst in the perfection of its logical form Roman law is in marked opposition to our system, in which a natural conservatism and dislike for change have struggled against an imperative need for reform, and effected compromises with the necessity of the hour, resulting in a marked absence of logical form and completeness. The principal value of Roman law to us consists in its utility for the purpose of comparison with English law; and for such

purpose an ordinary student ought in two years to acquire a sufficient knowledge, and that knowledge can be sufficiently tested by one paper. The basis of our law in regard to property is Teutonic or Anglo-Saxon custom, in regard to contract, mercantile usage—not Roman law, as in Scotland, on the Continent, and in South Africa.

The subject of Public International Law has been placed amongst the three compulsory subjects of Part II because it is an exceedingly useful and interesting one, of growing importance, and because it affords perhaps the best corrective to the rigid and somewhat narrow analysis of Austin. Since this was written the following paragraph has appeared in most of the daily newspapers:—

“Legal Scholarship offered.

“A well-known Solicitor, who desires to remain
“anonymous, has made an offer to the Council of
“the Law Society, to establish for three years a
“Lectureship and Scholarship in International Law
“in connection with the Society’s classes. The
“scholarship will be of the value of £50, and will be
“tenable for one year.”

The regulations for such lectureship and scholarship have now been published, and are to be found in the *Weekly Notes* for June 25th, 1904, at page 209. This is one of the most pleasing and cheering signs that has appeared for some time, showing, as it does, that some solicitors at all events are alive to the benefit of a wider curriculum than that prescribed by the Law Society.

One of the optional subjects of Part II requires to be specially mentioned, *viz.*, Logic, Psychology, and Ethics. I make no apology for introducing this paper as one of the non-compulsory subjects, because of its great value in the higher branches of legal study. The connection between Logic and the law of Evidence is a very close and obvious one, while psychology and ethics constantly come into play

in jurisprudence. The requirements of the paper would probably be met by the reading of Mill's *Logic* (a book which every lawyer ought to read), and some standard elementary work on psychology and ethics. These subjects have also an academic flavour which we expect in one worthy of the name of a jurist. Moreover, the subject is an optional one, and would probably be taken by non-professional students of law.

As to the other optional subjects little need be said. They are all subjects of great importance to the practising lawyer, particularly to the country practitioner whose practice consists largely of conveyancing and equity matters. As I have said before, they are subjects which would enable a young solicitor to continue his study of English law.

A student who took Part II at the end of his third year would probably select as his two optional subjects (1) Logic, Psychology, and Ethics; (2) The History of Roman Law with a portion of the Digest; as being most nearly allied to the other subjects which he would then be reading; while a student who deferred Part II until after he was qualified would probably select as his optional subjects two of the English law subjects, of which he wished to make a special study. In order to give a wide choice and meet the requirements of all classes of students, the list of optional subjects has purposely been made a somewhat lengthy one, and the whole scheme has been made as elastic as possible.

It will be observed that I have said nothing as to honours and prizes—I have done so advisedly, because that part of the question seems to me to be foreign to my present purpose, which is to deal with legal education in its broad outlines and not in its details. I must say, however, my own view is that there should *not* be any separate examination for honours. There should be three classes, the first equivalent to honours, the second a good pass, and the third a simple pass. A good pass degree will in most cases be

found to be a better preparation for active life than an honours degree. Many men in endeavouring to take honours overtax their powers and do themselves injury. Scholarships and prizes may be made the objects of separate examinations, for which only those who desire them need enter. Again, as to the books to be read, I have said nothing. There are plenty of good text-books on all the subjects. The Doctor's degree should be obtainable either by examination or evidence of original work, at the option of the candidate.

To sum up, there are five classes of students to be considered and provided for:—

Firstly. Those who simply intend to become solicitors and have no intention of doing anything more. This is by far the largest class, and due regard ought to be paid to that fact. It is the average man whose needs require most consideration. The extraordinary man, bent on study and determined to make his way, requires but little assistance. He will force his way to the front in spite of difficulties.

Secondly. Those who intend to become solicitors and also wish to take university degrees in law within their period of articles, *viz.*:—5 years.

Thirdly. Those who intend to become solicitors primarily, and afterwards, if possible, to take degrees. :

Fourthly. Students for the Bar, whether reading for degrees or not; and .

Fifthly. Non-professional students of law. .

It is claimed that some such scheme as that sketched out above would meet the requirements of all the five classes of students. It would provide a training in the principles of law for the first class, without unduly interfering with their practical training in the office. It would enable the second class, with fair diligence, to obtain degrees

while still serving under articles. It would operate as an inducement to the third class to continue their studies and obtain degrees. It would be of assistance to those stray students for the Bar who are to be found in the provinces, and I am not without hope that it would, to some extent, serve to popularise the study of law even amongst the fifth class, and cause law to enter more largely into a liberal education. Considering the extent to which the "Rule of Law" prevails in England, it is a surprising fact that so little attention is given to the study of law by laymen.

The great objection that will be urged against such a course will no doubt be the time that it involves. It will, no doubt, be said that in this busy commercial age when time means money, students of law, at all events professional students, cannot afford to give the amount of time demanded. In reply to this, I would say that to my mind the period over which the course is extended is the principal merit of the scheme, since it spreads the work over a greater period and at the same time interferes to the minimum extent with the practical training of students. With certain exceptions articled clerks are bound to spend five years in their professional training, and there is no need for the course sketched out above to exceed this period if they are so minded. There seems to be a general consensus of opinion that in ordinary cases it is not wise to abridge this period. The exceptions above referred to are (1) those who have been engaged in the practice of the profession for ten years and upwards; (2) those who have taken a university degree, either before or during articles. In the latter case, if the degree is taken before entering into articles, it means that at least six years must have been spent in study. If a man took his degree under the scheme suggested above, before entering his articles, he would be only seven years before becoming qualified—the old period of apprenticeship for most trades and professions. More-

over, the students at these local universities enter at an earlier age than those who go to Oxford and Cambridge.

It will, I think, be admitted that, if the profession is to hold its own in the future, there is more need for general culture. All things considered, the best educated man all round will make the ~~best~~ lawyer, and it is high time that the profession should strive by every means in its power to raise its standard both as regards professional and general education.

May I repeat in conclusion that what is said above is put forward with great diffidence, merely as the result of my own observation, and by way of suggestion. Particularly is this the case with regard to the details, to which I attach very little importance. It is the general scheme which I believe to be sound. And may I end by quoting a few words of great import?—Whatever scheme of legal education is adopted, these words will remain true—"Law should be studied as a science, as a historical growth: for let it be remembered that no school ever succeeded in teaching practice. That is the lesson of life." (*Law Times*, January 10th, 1903, page 230).

G. GLOVER ALEXANDER.

II.—THE AMSTERDAM MARITIME LAW CONFERENCE.

THE work of the recent Amsterdam Conference (held on September 14—16), the fifth which the International Maritime Committee has convened during the seven years of its existence, may be described as revision of former work rather than the inception of new. For this reason, while not less interesting to lawyers, as the range of suggestion was considerable, it has less to show in the way of positive progress than its predecessors.

Though the British representation was not so strong as at Hamburg in 1902—perhaps partly owing to the refusal of our Government to be officially represented at the forthcoming International Conference which it is proposed shall examine the draft treaties on collision and salvage passed at Hamburg—the presence of official delegates of the English Bar Council, Mr. English Harrison, K.C., and Mr. Acland, K.C., shows that British lawyers are beginning to treat the movement as one likely to have a practical issue. The programme of the Conference dealt with three branches of Maritime law in which uniformity is thought possible:—(a) what law should govern the question of ownership of ships, ship mortgages, and maritime liens or rights *in rem*, or “privileged” debts on the ship; (b) what courts should have jurisdiction in collision; (c) what law should be adopted for limitation of shipowners’ liability.

On the first question the alternative courses suggested were either the adoption of an uniform law, or that of an existing law, such as that of the flag. The German Committee were in favour of applying the latter generally, on the ground that ships being subject in most systems to the general law of moveable property the change required for uniformity would be difficult to obtain, except as regards formalities of transfer and the liabilities resulting under contracts, which should be left to the *lex loci actus* and *contractus* respectively. The French and Italian representatives advocated an uniform law; and the British delegates took the same line, pointing out that the difficulties of the present system were permanent and not ephemeral, and that in English law the change could be made, ships being the object of special legislation. The Dutch Committee thought that the difference in character between the British and the Continental ideas of privileged debts was too great to admit of an uniform law, and advocated the law of the flag, M. Asser thinking that in the case of maritime hypothec

the decisive point of time should be the date of its constitution and not that of its enforcement. Dr. Sieveking, dissenting from his German colleagues, proposed that questions which had an international bearing, such as casualties happening during the voyage, should be dealt with by uniform law, while such questions of merely national interest, as the acquisition of property in ships and mortgages, should be left to municipal law; and this was adopted by the Conference.

On the subordinate question what should be the relative rank of such "privileges" or liens, a notable concession was made to English law in the recognition of a maritime lien for collision. The French Committee were of opinion that the classification of liens should be left to the *lex fori* in each case, as is the case under our law to-day: but this would not have altered the difference existing between the British system and the Continental systems speaking generally. A comparison of our system with the Italian system will serve to show its extent. In our law all maritime liens are treated as equivalent, and rank in the inverse order of date at which they arise, with the exception of collision, which takes precedence of all others except perhaps subsequent salvage. Maritime liens are given against the ship and freight in whosever hands they are for salvage (for which the cargo also is liable), collision, wages of master and crew, master's disbursements for ship, pilotage and bottomry. Mortgages and possessory liens, such as that of ship repairers, are postponed to maritime liens already existing. A right of recourse *in rem* is given for necessities supplied to ships, foreign or British, no owner of which is resident in England or Wales, as also for breach of the contract of carriage to owners of cargo, if no owner of the ship is resident in England and Wales; and these take effect from time of process only. General average and insurance have no special remedy. Under the

Italian law "privileges" are given against the ship, freight, and cargo in a fixed order, but the order of incidence against these several interests is not the same, and the general principle is that conservatory measures have the preference and collision comes last, and where there are several voyages the debts incurred during the last have priority. Judicial costs and salvage come first and second against all; wages rank third against the freight of that voyage, and seventh against the ship; general average ranks fourth against the freight, sixth against the cargo, and eighth against the ship; debts incurred by the captain for the necessities of ship during the voyage come eighth upon the cargo, seventh on the freight, and ninth against the ship; while insurance premiums fall seventh on the cargo, fifth on the freight, and tenth on the ship. Damage by navigation falls seventh on the freight, and apparently eleventh on the ship, after bottomry bonds.

M. Franck (Belgium) proposed that collisions should be given a lien similar to that in English law, but with the addition that wages should come first in any event. The French, German, and Dutch representatives were opposed to adding another privilege to the already numerous class of them in their legislations: but the proposal was finally carried by the votes of all the nationalities. The rank of the lien was referred to a committee, after the Conference had declared against giving it the first place as in our law. The foundation of this priority was explained by Mr. Justice Barnes in a recent Mersey case, as resting on the involuntary origin of this lien as compared with the contractual nature of the others.

The next subject, the draft treaty embodying the rules of jurisdiction in collision adopted at Hamburg, produced an interesting discussion, though the form of the project was not altered. No opposition was made to the jurisdiction of the Courts of (1) the defendant shipowners' domicil or (2) the

ships' port of registry; and only slight opposition (French and Italian) was made to giving "*competence*" to the *forum arresti* whether bail given or not, an amendment by a Belgian representative (M. Langlois) that this jurisdiction should be limited to arrest made in the course of the voyage during which the collision occurs only receiving Belgian support. But the fourth basis of jurisdiction, namely, that of the territorial Court of the place of collision, was stoutly contested, as it was at Hamburg, and it only passed, as then, by a majority of the smaller States, this time Hungary, Italy, Japan, Norway and Austria, against Great Britain, Germany and Belgium, the French Committee being divided and the United States not being represented. M. Autran (Marseilles) proposed a resolution which he had brought forward at Hamburg, that jurisdiction in collision as regards hearing the case (*competence du fond*) should be restricted to the Courts of the defendant's domicile and the ship's port of registry, though the territorial Court could take conservatory measures and hear witnesses, etc. He based this on the ground that to give jurisdiction to the territorial Court was equivalent to making every Court in the world competent, and such Courts might be quite unfitted for determining such cases, instancing the French *tribunals de commerce*. M. Franck, however, pointed out that this principle was one of public order in many States who regarded it as connected with their sovereignty, and would not surrender it: and that the inconvenience of having conflicting judgments in the same case was less than that of compelling the plaintiff in all cases to go to the defendant's Court, and of having the case heard piecemeal by several Courts. That the inconvenience emphasised by M. Autran exists is shown by a case cited by Dr. Govare (Paris) as happening in his experience, when owing to a collision in the Scheldt between a Spanish ship and an English ship, which afterwards put into Hamburg, actions were brought by interested parties in

England, Belgium, Germany and Spain. Dr. Sieveking thought that considerations of public order would prevent the consent of all the Governments being obtained to such a renunciation of their rights and duties, and the amendment was rejected. A proposal by the British delegates to reject this basis of jurisdiction as practically inconvenient for the trial of the question, though supported by Dr. Sieveking on the ground that the territorial Court might not be able to enforce any judgment it gave, when neither the defendant nor the ship were in its jurisdiction, and that other Courts might not be willing to lend it their help, was similarly rejected. A like fate befell a Hungarian amendment (by M. Vio) that if the defendant gave bail in the place of collision, or in his domicile, the plaintiff should be obliged to bring his action there.

The second article of the treaty declared that the Courts competent to entertain the principal action in collisions should be equally competent over a cross action brought by the defendant in respect of the same collision. M. Lyon-Caen proposed to make it obligatory (instead of optional) on the defendant to bring his cross action in the *forum* chosen by the plaintiff with a view to concentration of suits, the same idea as that underlying M. Autran's previous proposal to make only one Court (the defendant's) competent; but this was defeated. The fourth article limiting a plaintiff to one action only in respect of the same collision, though several Courts should be competent if his judgment was satisfied, was held to be ambiguous: and the other articles giving the above-named Courts jurisdiction for preliminary purposes such as getting evidence, and regulating arrest and bail of ships, require no comment.

The last subject was the vexed question of the limitation of shipowners' liability, formulated in a treaty embodying the resolutions adopted in London in 1899 and Paris in 1900. It proposed that the shipowners' liability should be

limited in respect of (a) the acts of the master and crew and the engagements made by the master as such; (b) contracts within the scope of the master's duty, even though made by the shipowner, whether that breach be due to a member of the crew or not, but not if due to the shipowner's personal fault; (c) damage to dykes, quays and fixed objects, and removals of wrecks; but not (d) in respect of personal injury or wages of master and crew. Under it the shipowner would have the option of limiting his liability, either according to the Continental system by paying the net value of the ship and freight at the end of the voyage, including general average and compensation received for collisions and damage, but not insurance: or according to the British system by payment of £8 per ton; and in the former case, where there is a prior lien on the ship and freight in favour of creditors against whom limitation of liability is not allowed, the shipowner should supplement personally the amount so withdrawn to make up the full value of ship and freight.

In all systems limitation is allowed for collisions; but our law does not give it in contract. The scope of limitation in contract proposed by the treaty is taken from the German law; this goes further than the Italian and other systems which only allow limitation in respect of contracts by the master; and either of these would produce a revolution in English law. The alternative character of the limitation, adopted as a compromise between the British and Continental systems, was criticised adversely by the Hungarian and Dutch Committees: and the German Committee deprecated the introduction of the limitation in matters of contract (though taken from their law), as unlikely to obtain British assent, which was still divided on the question whether the Continental limitation should be allowed in cases of torts. A proof of this was furnished in the Report of the Maritime Law Committee of the Inter-

national Law Association, signed by Lord Alverstone, Mr. Justice Phillimore, Judge Raikes, Mr. Carver, K.C., and Sir John Gray Hill, stating that, owing to the notorious divisions of opinion existing in England and in the Committee, they could make no recommendation. Mr. McArthur, M.P., who attempted, by an abortive Bill in the House of Commons in 1900, to combine the two systems of limitation in torts by allowing the British system in collisions between British ships, and either that system or the Continental one in collisions between British and foreign ships, expressed the view that the extension of limitation to contracts made at Paris in 1900 would be a stumbling block in England. The other British delegates present, however, were in favour of the treaty as it stood, and it was passed as a first reading, the only opposition coming from the Dutch Committee. The hope was expressed that the next meeting would be held in England, perhaps at Liverpool, in order to ascertain English opinion on this point.

The underlying difficulty in reaching agreement on this point (as in a lesser degree on the others) is the difference between the British and Continental conceptions of the shipowners' liability, the one treating it as a personal liability which should be independent of what happens to the *res*, the other as a real liability limited to the value of that particular *res* to the shipowner.- While in the one case collision is regarded as an act of negligence for which the shipowner is bound to make restitution as any other wrongdoer is, in the other it is treated as an accident of navigation for which he is only made responsible on grounds of policy up to the value to him of the particular venture. Policy is admitted in both systems to the extent that the liability should be limited in some way, and it seems that only considerations of policy should decide the method of limitation. Under present conditions, British shipowners can be and have been held responsible in France for a collision in

French waters, up to the value of ship and freight, in a French Court, after limiting their liability in an English Court for the same collision. The compromise offered by treaty would at least prevent this double liability. Whether official international agreement can be reached in all these matters will largely depend on the result of the proposed Brussels Conference. Its success, even in a matter in which there is so little disagreement, will be a solid cause of encouragement to the workers in this movement to hope that even the problem of agreement on the limitation of shipowners' liability will in time be solved.

G. G. PHILLIMORE.

III.—THE NEUTRALITY OF GREAT BRITAIN: THE FOREIGN ENLISTMENT ACT 1870.

(Continued from Vol. XXIX, page 467.)

WASHINGTON, who initiated the Municipal legislation of the United States on foreign enlistment, which Canning avowedly set up as the model of the English Act of 1819, explicitly wrote that he did not want to check shipbuilding.¹ Leading cases decided under the Neutrality Act of the United States 1818 have held that it is not an offence for a subject of the United States to sell a ship of war, fully armed and equipped, to a belligerent if there is no previous contract or agreement, but the shipbuilder takes the vessel and sells it to the belligerent out of the jurisdiction of the United States.²

A subject of the United States who sells a ship under

¹ Cf. the remarkable letter to Hamilton, Secretary to the Treasury, in note to Report of *Attorney-Gen. v. Sillem* ([1863], 2 H. & C. 431, 446).

² *Santissima Trinidad*, 7 Wheaton's *Am. Rep.* 283, *United States v. Quincy* ([1832], 6 Peter's Rep. 445).

the above circumstances is not considered to have built or purchased it with the intention of employing it against a friendly State, as it has been held that "intention," to be within the Neutrality Act, must be a present or fixed, and not a conditional or contingent intention. There can be no present or fixed intention unless there is a previous contract or agreement.

In *Attorney-Gen. v. Sillem*,¹ Pollock, C.B., entirely rejected this construction as regards the Foreign Enlistment Act 1819, saying: "A whole fleet of ships might sail through such an Act of Parliament as this, if this be the meaning of it."

But the instructive and authoritative article of Sir H. Stephen (*Law Quarterly Review*, April 1904, pp. 186—194) shows that, in cases of forgery and embezzlement, English Criminal law takes the very distinction between a present or fixed, and a contingent or conditional intention, that is the principle of the American cases above alluded to. In such cases it is not a good defence to set up a conditional or contingent intention to repay: in other words English law construes intention as meaning present or fixed intention as much as American.

The fact that the Russian regulations as to contraband class ships of war as contraband,² illustrates the conclusion of the Neutrality Laws Commissioners, that the illegal shipbuilding section of the Foreign Enlistment Act 1870 penalises an act which is lawful by all other Municipal laws. This proves that the Empire of Russia cannot be included among the important maritime powers who, Hall observes,³ have adopted an international usage, prohibiting the construction and outfit of vessels of war as an infraction of neutrality. It must, however, be admitted equally that Japan does accede to the international usage traced by Hall, since she does not class ships as contraband.⁴

¹ 2 H. & C., 431, 528.

² *Int. Law*, p. 639.

³ *Times*, March 1st, 1904.

⁴ *Cf. Times*, February 20th, 1904.

One reason for the growth of the international usage prohibiting the outfit and construction of vessels of war, seems clearly to be that when the contraband article is the ship, the injured belligerent's right of capture cannot extend to anything but the contraband article, though a ship supplied for hostile use is a flagrant case of contraband,¹ and in flagrant cases of contraband the modern usage is to recur to the ancient law which always exacted an additional penalty beyond the forfeiture of the contraband article, by also confiscating the ship.²

It is curious to note that Pothier expressly confines the belligerents' right of capture in cases of contraband to the contraband goods.³

Even Vattel considers that the only case where the conveyance of contraband works the confiscation of the neutral vessel is where the neutral ship refuses to be searched.⁴

But Sir H. S. Maine observes: "If the ship belongs to the owner of the contraband, or if the owner of the ship is privy to the carriage of the contraband, the ship is condemned."⁵

A great number of cases are quoted in Phillimore where the aggravation of circumstances in the conveyance of contraband has worked the forfeiture of the vessel. Hall cites Heffter, sect. 161, as the authority for this conclusion: "If, however, the ship and the cargo belong to the same owners, or if the owner of the former is privy to the carriage of the contraband goods, the vessel is involved in their fate."⁶ The same author also observes that the ancient practice, except in France, where, until

¹ Phillimore's *Int. Law*, Vol. III, p. 360; Hall's *Int. Law*, p. 639.

² Phillimore's *Int. Law*, Vol. III, p. 372; Woolsey's *Int. Law*, p. 342; Wheaton's *Int. Law*, s. 505, p. 660; Halleck, Vol. II, 217.

³ *Traité du Droit de Domaine de Propriété*, t. I, Pt. i, c. 2, art. 2.

⁴ Bk. III, c. 7, s. 114.

⁵ *Int. Law, The Whewell Lectures*, V, 105.

⁶ Hall's *Int. Law*, p. 667.

1681, goods were only seized on payment of their value, was to confiscate both cargo and ship.¹ Lawrence observes that Russia, according to the Russian Declaration, 1854, seems to adhere to the practice of confiscating both cargo and ship.² It is clearly established by modern usage, that, in aggravated cases at all events, the vessel and the contraband goods are confiscated, and as no such additional penalty is possible when the contraband article is a ship, there seems to be substantial reason for taking ships out of the category of articles which are contraband and nothing more, and prohibiting their construction and outfit as an infraction of neutrality. Further, by sect. 9 of the Foreign Enlistment Act 1870, the *onus probandi* lies on the ship-builder of proving that he does not know that the ship was intended to be employed in the service of the belligerent State. Similar enactments, throwing the *onus probandi* on the accused, are to be found in the Forgery Act 1861, ss. 9, 10, and others; in the Coinage Offences Act 1861, ss. 6, 7, and other sections; and the Explosive Substances Act 1883, s. 4. In such cases, it has been held in America that the prosecution must produce *primâ facie* evidence.³

There must be some evidence to start the presumption.⁴ The rule as to the weight of evidence arising from a particular fact being more peculiarly within the knowledge of a party, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant.⁵ Therefore, in cases under this provision of the Foreign Enlistment Act, the burden of proof is incumbent on the prosecution, who will have to make out a *primâ facie* case. The burden of proof, in spite of the shifting of the *onus probandi* on the accused, would clearly lie on the prosecution

¹ *The Neutralitet*, III, Rob. 295.

² Hall, *Int. Law*, p. 660, and note.

³ *The Commonwealth v. Thurlow* (24 Pick. 374).

⁴ *Elkin v. Janson* (13 M. & W. 655, 662).

⁵ *R. v. Burdett* (4 B. & A. 95, 140).

in an indictment under this provision, on the well-known test that the defendant would be acquitted if no evidence were given.

There have been no decisions under the shipbuilding sub-section, *i.e.*, the Foreign Enlistment Act 1870, sect. 8, sub-sect. (1).

Section 8, sub-sects. (2) (3) (4), respectively prohibit the issuing a commission for, equipping, or despatching any ship with intent that it shall be employed in the military or naval service of a belligerent.

There have been two cases under sect. 8, sub-sect. (4). The facts in one of them¹ were that, at a time when there was war between France and Germany, an English company entered into a contract with the French Government to lay down in the sea a series of telegraph cables between certain places on the French coast. The places on the coast between which the cables were to be laid were so situated that by means of short telegraph lines carried over land, the series of cables could be united in one line, and be made to afford complete telegraphic communication between Dunkerque and Verdun. The company having shipped the telegraphic cables on board a steamship belonging to them, specially fitted for the purpose of laying submarine cables, were, during the continuance of the war, about to despatch the steamship from the port of London, to lay down the cables according to the contract, when the steamship was, by order of one of Her Majesty's principal Secretaries of State, detained upon the ground that it was about to be despatched contrary to the Foreign Enlistment Act 1870. On a motion for release of the ship it was proved, to the satisfaction of the Court, that the undertaking in which the ship was about to be engaged was of a commercial character: that the object of the contract was to furnish ordinary postal telegraphy, and the Company were not parties, directly or

¹ *The International* ([1871], L. R., 3 A. & E. 321).

indirectly, to any project for adapting the line of cable to military purposes. It was held that the company were entitled to have the ship released. Although the Court considered it probable that the line, when completed, would be partially used for effecting communications between the armies of France, it held that such probability was not sufficient to divest the line of its primary commercial character, or to clothe the service to be rendered by the ship with the character of "a military or naval service" within the meaning of the Foreign Enlistment Act 1870. But, *semble*, a ship employed in the service of a foreign belligerent State, to lay down a submarine cable, the main object of which is, and is known to be, the subserving of the military operations of the belligerent State, is employed in the military or naval service of that State within the meaning of the Foreign Enlistment Act. The case of the *International* (*supra*) therefore shows that a ship belonging to a company may be detained or forfeited under sect. 23 of the Foreign Enlistment Act 1870. In 1871, a corporation could not (but may now) be indicted under the Act. But the proceedings in the case of the *International* were for the condemnation and forfeiture of the ship under sect. 19, and by sect. 20 the institution of such proceedings is entirely independent of taking criminal proceedings against the offender. In the *International*¹ Sir R. Phillimore observed that—"The Act confers special powers on the Secretary of State (sect. 23), which he may exercise in two ways; he may issue a warrant for the detention of a suspected vessel, and then simply detain such vessel, taking no further proceedings, and leaving the owner to make his application for release to this Court, or he may proceed to obtain the condemnation and forfeiture of the vessel to the Crown." In *Attorney-Gen. v. Sillem*,² Pollock, C.B., observed—"It should be borne in mind the property is

¹ *Supra*, at p. 333.

² *Supra*, at p. 508.

not forfeited unless the crime has been committed." The case of the *International* shows that, under the Foreign Enlistment Act 1870, the property may be detained although the crime has not been committed, as the Court in that case both considered the detention of the vessel was justifiable and that no crime had been committed. In the other case decided under the Foreign Enlistment Act 1870, s. 8, sub-s. (4), that of the *Gauntlet*,¹ the facts were that a French ship of war captured in the English Channel a Prussian ship as prize of war. A prize crew under a French naval officer was put on board. The prize ship, being driven by stress of weather into the Downs, anchored within British waters, and after lying there two days the French Consul at Dover engaged an English steam-tug, then lying in the Downs, to tow the captured ship from British waters to a port of the captors, and under such agreement the tug towed the prize to Dunkirk Roads. In a suit instituted on behalf of the Crown for condemnation of the tug for violation of the Foreign Enlistment Act, the Judge of the Court of Admiralty held, that no offence had been committed under that statute, as the steam-tug was not employed in the military or naval service of France, as declared by the 8th section, and dismissed the suit, condemning the Crown in costs. On appeal it was held by the Judicial Committee (reversing such decree) that the engagement by the owners of the tug for the express purpose of towing the detached prize crew, prisoners and prize vessel, speedily and safely to French waters, where the prisoners and prize would be taken charge of by the French authorities, and the prize crew set free, was despatching a ship, within the meaning of sect. 8 of the Foreign Enlistment Act 1870, for the purpose of taking part in the naval service of a belligerent, and condemned the tug as a forfeiture to the Crown. The headnote of the learned reporter

¹ ([1872], L. R., 4 P. C. 184.

to the case states that it is doubtful whether a Court of Admiralty has power, under the Foreign Enlistment Act 1870, to condemn the Crown in costs. In this case the Solicitor-General observed that the Act gives no power to the Court of Admiralty to give costs for or against the Crown. By sect. 23 of the Act damages may be awarded, *semble*, to the owner where the detention is considered by the Court unjustifiable but only, *semble*, further, if there are any moneys legally applicable to the purpose. James, L.J., observed,¹ that on the subject of costs it was no longer the interest of the respondent to contest the proposition of the Solicitor-General, who admitted that his principle is to apply as well against as in favour of the Crown. But not having heard the argument of the respondent's counsel on the point, James, L.J., declined to pronounce any decision on the point. Under the ordinary jurisdiction of the Admiralty Court, costs cannot be given against the Crown under the 18 & 19 Vict., c. 90, unless the Attorney-General is a party, and by sect. 19 of the Foreign Enlistment Act 1870 the Admiralty Court exercises in the proceedings for the condemnation of a ship all the powers which it has in matters brought before it in the exercise of its ordinary jurisdiction. Under the Foreign Enlistment Act 1870, s. 8, a ship-builder who builds a ship for a belligerent, the building of which was commenced before the war, is not liable, if, immediately upon a proclamation of neutrality being issued by his Majesty, he (1) gives notice to the Secretary of State that he is so building and also of the particulars of the contract; (2) gives such security as the Secretary of State may prescribe that the ship shall not be despatched or delivered without the King's licence until termination of the war.

The Foreign Enlistment Act 1870, §. 10, imposes the penalties of the Act on aiding the warlike equipment of foreign ships—(1) By adding to the number of the guns;

¹ *The Gauntlet*, p. 194.

(2) By changing those on board for other guns: (3) By increasing the warlike force of any ship by the addition of any equipment. It is necessary in each case that the foreign ship is at the time—(i) within the dominions of the Crown; (ii) in the military or naval service of any foreign State at war with any friendly State.

The next section—Foreign Enlistment Act 1870, s. 11—renders any person within the limits of Her Majesty's dominions liable to fine and imprisonment, or either of such punishments, who prepares or fits out any naval or military expedition to proceed against the dominion of any friendly State. Hard labour may be inflicted under this provision; and the enactment also applies to persons assisting, or employed in any capacity in such expedition. By a succeeding sub-sect. (2) all ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty. Two cases have been tried under this section, one of them being the well-known case of the Jameson raid at the close of 1895.

The previous case, that of *R. v. Sandoval*,¹ has been noticed as regards the defendant who was jointly indicted with Sandoval, and as to whom the jury disagreed. Sandoval was convicted and sentenced to one month's imprisonment and a fine of £500, under sect. 11 of the Foreign Enlistment Act 1870, under the following circumstances:—An alien by birth, he bought some guns at Sheffield, and some ammunition at Birmingham, which he shipped on board a general ship for Antwerp. He then sailed for Antwerp, and arrived there about the same time as the *Justitia* and the ship conveying the munitions of war he had previously purchased. The defendant then superintended the re-embarkation of the guns he had bought in this country on board the *Justitia*. Sandoval then embarked on board the *Justitia* and assumed general command of

¹ ([1887], 16 Cox, C. C. 206).

those on board, among whom were three Venezuelan generals. In the Court for Crown Cases Reserved, where the verdict in *R. v. Sandoval* (*supra*) was affirmed as not being against the weight of the evidence, Day, J., observed that the defendant, after the *Justitia* left Antwerp and cleared for Trinidad in the West Indies, asserted himself to be the leader of the enterprise; the captain was the mere navigator. After the defendant left the ship at Trinidad, the ship made for a place called Carwpano, on the mainland of Venezuela, where a British consul was said to be, but one could not be found. She there took in tow a flotilla of boats, filled with armed men, and after harmlessly shelling a custom house, engaged with a Venezuelan man-of-war, and was worsted, one of the generals on board being killed, and then retired to San Domingo, whence the crew was sent back to England. It has been pointed out that the circumstances of the departure of this vessel from British waters exhibit a close parallelism to those of the departure of the *Alabama* and *Oreto* from the Mersey, because in all three cases the ship was not fully equipped for war in any port belonging to the dominions of the Crown. One feature in which, however, they may be distinguished is that, while the papers of the *Justitia* were regular, the *Oreto* left Liverpool clandestinely, and the *Alabama* had no papers whatever, when she was sailing round the north coast of Ireland to Terceira. Both the *Oreto* and *Alabama* ultimately received a commission out of the jurisdiction. The *Justitia* is stated to have raised a foreign flag when off Trinidad, but *semblé*, never received a commission, even from the revolutionary party in Venezuela, as the Revolution only broke out as soon as the vessel arrived off the coast. On the other hand, the Civil War between North and South had been raging for a year before the *Alabama* left the Mersey. The expedition of the *Justitia* was, Wills, J., pointed out, contemptible, whereas

the belligerent operations with which the *Alabama* was connected were on a scale to astound mankind. But this, in turn, does not affect the legal principles involved.¹

In the Court for Crown Cases Reserved, Wills, J., considered that the defendant in that case had helped to prepare and fit out an illegal expedition, although he took no part in any overt act of war, because the defendant, (1) bought guns and ammunition in England and shipped them to Antwerp. If he had done nothing more than this, Day, J., observed,² he would not have been considered guilty of having fitted out an illegal expedition. But Wills, J., pointed out that the defendant also, (2) superintended the re-embarkation of the guns on board the *Justitia* at Antwerp; (3) acted as leader of the enterprise as far as Trinidad; (4) made no apparent effort to control the destination of the warlike merchandise after he left Trinidad.

Instructive parallels seem to admit of being drawn between this case and that of *R. v. Jameson*. In both cases the Court pointed out:—(1) that the expedition was contemptible from a military point of view, but that this circumstance does not affect liability under the Foreign Enlistment Act, 1870, s. 11;³ (2) that the motive of the expedition is immaterial, it is equally illegal whether it is only to produce “a moral effect,”⁴ or whether it is the motive of philanthropy or honour, or the desire to reform the law by show of force;⁵ (3) that the cardinal point is the intention. Nothing can so aptly illustrate the ruling of the Court for Crown Cases Reserved in *R. v. Sandoval* (*supra*) as the observation of Lord Russell of Killowen,

¹ Cf. the observations of Wills, J., in *R. v. Sandoval*, *supra*, at p. 212.

² *R. v. Sandoval* ([1887], 16 C. C. C. 206, 209).

³ Cf. the observations of Wills, J., in *R. v. Sandoval* (16 Cox, C. C. 206, 212); and of Lord Russell, L.C.J., in *R. v. Jameson* (*Times*, July 29th, 1896, p. 13).

⁴ Cf. the observations of Wills, J., in *R. v. Sandoval*, *supra*, at p. 211.

⁵ Per Lord Russell, L.C.J., in *R. v. Jameson*, *ibid.*, *supra*.

L.C.J., that—"It must be proved as the foundation of the offence that a person has without the licence of the Queen in a place within her dominions where the Act is in operation, prepared or fitted out a military expedition to proceed—that is, with the intention that it should proceed—against the dominions of the friendly State. It is not necessary to constitute the offence that it shall proceed or have proceeded. The cardinal point is the intention. The offence is complete if the person aids and abets the preparation with that intention."¹ Lord Russell then proceeded to point out that the serious conflict that took place in the Transvaal at the time of the Raid, when twenty-five lives were lost, and an indeterminate number wounded, was not essential to the completion of the offence. In *R. v. Jameson*, all the defendants accompanied the expedition and took part in the belligerent operations. But in *R. v. Sandoval (supra)*, the Court considered it immaterial that the defendant had in fact left the *Justitia* before the belligerent operations off the coast of Venezuela commenced, Wills, J., observing that the motive of the defendant in landing at Trinidad, whether it was personal safety or the desire to avoid criminal proceedings, was equally immaterial. This last case, therefore, aptly illustrates Lord Russell's *dictum* in *R. v. Jameson*, that the cardinal point which constitutes an offence under sect. 11 is the intention of the person indicted, that a military expedition should proceed against the dominions of a friendly State. This is an instance where modern International law has an important bearing on the Foreign Enlistment Act 1870. Illegal shipbuilding is an allied topic to illegal expeditions, and are both treated of in the same part of the Act. Hall, in discussing the international usage prohibiting the construction and outfit of vessels of war, observes that "Jurists plant their doctrine upon the

¹ *R. v. Jameson (Times, 26th July, 1896, p. 13).*

foundation of the intent of the neutral trader, or of the agent of the offending belligerent in the neutral country, and not upon the character of the ship itself."¹ The intention, therefore, is equally the cardinal point determining a breach of neutrality arising from building a ship for a belligerent by International law, as it is for determining the offence of preparing an illegal expedition under the Foreign Enlistment Act, 1870, s. 11. The judgments of the dissenting Barons in the Exchequer Chamber, in *Attorney-Gen. v. Sillem*, (*supra*), considered that the material question was the intention with which the equipment of the vessel was made, and not the extent of it. Their judgments, therefore, anticipated in terms the modern international usage prohibiting the construction and outfit of vessels of war, the foundation of which doctrine is the intent of the neutral builder or belligerent agent.

It is quite clear that the usage dates from the *Alabama* affair and its developments, since Phillimore's *International Law*, Ed. 1857, styled by "Historicus," "a digest of all the cases and authorities in International law," collected with laborious impartiality, is entirely silent as to the existence of any international usage prohibiting the construction of vessels intended for war, and treats a ship for use in war as merely contraband. A work like Phillimore's *International Law* would not be likely to err on the side of omission, and would certainly have alluded to such an important development of the maritime law of neutrality as the usage in question, if it had existed in 1857.

The leading facts in the celebrated trial at Bar of Dr. Jameson and others were as follows:—Up to the close of 1895 the troopers who were about to engage in the Raid constituted an Imperial force. During November and December of that year they were disbanded as an Imperial force, but were then reorganised as the Chartered Company's

¹ *Int. Law*, p. 640.

police, as a result of further powers given and further confidence reposed in the representatives of the Chartered Company. Preparations to effect the transfer were carried out partly at Mafeking and partly at Pitsani Pitlogo. At this date, evidence was adduced at the trial to show, there was a reign of terror at Johannesburg, the Boer police were withdrawn, and women and children were said to be panic-stricken. Evidence was also adduced to show that the defendants had some ground for belief that if they entered Johannesburg with a view of restoring order and affording protection, they would be assisted by the Natal Mounted Police and Cape Mounted Rifles and 2,000 men from Johannesburg. Under these circumstances, the principal defendants—Dr. Jameson, Colonel Sir John Willoughby, and Colonel White—invaded the Transvaal from Pitsani Pitlogo on 29th December, 1895, and were met at Malmani, in the territory of the late South African Republic, by the rest of the troopers from Mafeking. Lord Russell of Killowen, L.C.J., thus described the expedition: "It was an expedition of trained troops, properly equipped with horses, arms, and ammunition, and officered by military men, all of whom had the honour of holding Her Majesty's commission. It was accompanied with Maxim and field guns, and marched as an army, with advance and rear guards."¹ On the 31st December, 1896, the defendants were warned by Mr. Newton, the messenger of Sir H. Robinson, the Queen's representative at the Cape, to withdraw from the Transvaal. The next day they received a similar message from Sir Jacobus de Wet, British *Chargé d'Affaires* at Pretoria. Both these warnings were disregarded. Up to the 1st January, 1896, Lord Russell pointed out no serious harm had been done, and there was a *locus pœnitentiæ*. But on that day the column shelled the Queen's Mine, and some loss of life resulted.

¹ Cf. *Times*, *supra*.

On the 2nd January there was a serious conflict between the troopers commanded by the defendants and the Boers, with consequences that have been alluded to. The case was remarkable, Lord Russell observed, in the entire unanimity as to the facts. In his summing up, *The Times* observed, Lord Russell rose at times to great eloquence, and Mr. A. Birrell, K.C., has observed that the case of *R. v. Jameson* is generally regarded as the greatest case of that great judge. Lord Russell left three questions to the jury:—(1) Were the defendants, or any and which of them, engaged in the preparation of a military expedition at Mafeking to proceed, and with the intention that it should proceed, against a friendly State, the South African Republic?—(2) Did the defendants, or any and which of them, assist in the preparation of such expedition, or aid, abet, counsel, or procure such preparation?—(3) Were the defendants, or any and which of them, employed in any capacity in such expedition?

The jury were also asked—"Did Her Majesty the Queen by her representation exercise, in fact, dominion and sovereignty in the district in which Pitsani Pitlogo is situated?" The jury having returned an affirmative answer to all three questions, the defendants were sentenced to varying terms of imprisonment, without hard labour, from fifteen months downwards.

By the Foreign Enlistment Act 1870, s. 14, illegal prize brought into British ports is to be restored. Prize is illegal when the ship is captured within the territorial jurisdiction of the Crown, and when the capturing vessel has been built, equipped, commissioned, or despatched, or has had its force augmented, contrary to the provisions of the eighth section.

Sir James F. Stephen, from the point of view of Municipal law, and Halleck, from the point of view of International law, have observed that the Foreign Enlistment Act 1870, ss. 16—29, strengthens the hand of the Executive.

By sects. 23, 25, the Secretary of State is given special power to detain an illegal ship, and to grant a search warrant to any person to enter any dockyard. By sect. 24 the chief executive authority or local authority may detain a ship if, on representation to him, he believes there is reasonable and probable cause for believing that a ship has been or is being built, commissioned, or equipped contrary to the Act. The local authority must communicate the fact of detention to the Secretary of State or chief executive authority. The local authority cannot grant a search warrant; and the Secretary of State may release a ship detained by the local authority. But, when the local authority has detained a ship, and the Secretary of State considers the detention justifiable, he issues a warrant stating that there is reasonable authority for believing the Act to have been transgressed, and proceedings are then taken as if the warrant had been issued without any communication from the local authority. A ship may be seized by any naval or military officer, acting on instructions, or by a Commissioner of the Customs. By sect. 22, officers are authorized to use force, if necessary, for the purpose of the seizure and detention of the ship. By sect. 28, officers or local authorities are exonerated from either civil or criminal responsibility for seizing or detaining a vessel under the Act, subject "to the provisions of this Act providing for the award of damages in certain cases in respect of the seizure or detention of the ship."

By sect. 23 damages are only to be awarded for the detention of the vessel, if the Court is of opinion that there was no reasonable and probable cause for the detention. But this point has never been raised, as in the two cases in which a vessel was released, the Court as clearly considered that there was reasonable and probable cause for the detention.¹ The damages are to be "payable by the Commissioners of the Treasury out of any moneys legally

¹ *The International and the Gauntlet (supra)*.

applicable for that purpose." It appears from the case of the *Gauntlet* (*supra*) that this provision gives no power to the Court of Admiralty to give costs for or against the Crown, unless the Attorney-General is a party, because, by the Foreign Enlistment Act 1870, s. 19, the Court of Admiralty, in proceedings under the Act, is only deemed to exercise its ordinary jurisdiction.

It is interesting to note that Lord Palmerston said in the House of Commons—"I have myself great doubts whether, if we had seized the *Alabama*, we should not have been liable to considerable damages.¹ By sect. 33 the penalties of the Act are not to extend to persons entering into the military service of any prince, State, or potentate in Asia, with such leave or licence as is for the time being required by law in the case of subjects of the Crown entering into the military service of princes, States, or potentates in Asia. There was a similar provision in the Act of 1819.

In a case under the Foreign Enlistment Act 1819, *The King of Two Sicilies v. Wilcox*,² it was held that a corporation could not be indicted under that Act. But the joint effect of the interpretation clause, sect. 30, of the Foreign Enlistment Act 1870, and the Interpretation Act 1889, s. 2, sub-s. (1) is that a corporation can be indicted under the Act of 1870.

N. W. SIBLEY.

IV.—THE REPORT OF THE COMMISSIONERS OF PRISONS, 1903-4.

FOR the last few years the Annual Report of the Prison Commissioners has been an interesting document, as showing, in an authoritative form, the various changes which

¹ Hansard; Vol. CLXX, p. 91.

² [1850], 7 *St. Trials*, N. S., 1,049.

have been effected in prison methods and prison administration since the appointment of Mr. Gladstone's Prison Committee during the last Liberal Administration. It cannot be said that the present Report contains anything particularly new, or calls for quite the same amount of attention as some of its predecessors. Some authorities consider the prison population as, on the whole, the best index to the state of the country as regards the prevalence of crime. Without endorsing this contention, it must yet be admitted that the number of offenders committed to prison is a very valuable barometer as to the criminal condition of the country. The things which militate against it as an absolute test are, first, the fact that the police may be less or more successful in bringing offenders to justice; secondly, the fact that sentences may be made shorter or longer in duration; and, thirdly, the fact that fines and other punishments may be in many instances taking the place of imprisonment. All these facts have to be taken into consideration before we can draw any conclusions as to the amount of crime in the country based on the prison returns alone. If there is little or no change in the conditions just referred to, then it must be admitted that the year 1903-4 is a year in which crime as measured by the prison returns has tended to increase, whether we base our calculations on the annual numbers committed to prison or on the daily average of offenders in prison throughout the year. Twenty years ago the number of offenders committed to prison and penal servitude by the ordinary Courts in England and Wales amounted in round numbers to 160,000, or 600 convictions per 100,000 of the general population; ten years ago this number dropped to 148,000, or 491 convictions per 100,000 of the general population; during the succeeding seven years, that is to say from 1895 onwards, the general tendency was for the total number of sentences to imprisonment to diminish; but during the

last three years this salutary and satisfactory tendency has been checked, and we have unfortunately been confronted with a slow but perceptible increase in the number and proportion to the population of sentences to imprisonment. The most recent figures are unhappily the worst of all. In the year 1903-4 the sentences to imprisonment amounted to 190,000, or 570 per 100,000 of the general population.

Before proceeding to comment on the conditions producing this somewhat retrograde state of things, one or two remarks require to be made as to the manner in which these statistics are presented to the public. When the late Sir William Harcourt (a statesman whose death men of all parties have reason to deplore) was Secretary of State for the Home Department, he established a rule that the commitment to prison of all children under the age of thirteen years should be notified to the Home Office, and unless very powerful reasons to the contrary could be produced it was his custom to liberate such children. Sir William Harcourt's successors in the Home Office have followed his excellent and statesmanlike example; magistrates have become aware of Home Office methods with regard to the imprisonment of young children, and as a result, only nine children under twelve years of age were committed to prison during the period covered by the present returns of the Prison Commissioners. If practically no juveniles under twelve years of age are committed to prison, the returns relating to the number of convictions per 100,000 of the population should be drawn up in consideration of this obvious fact. At the present moment these returns (see page 10 of the Report) include all ages of the population, children under twelve as well as persons over twelve, when as a matter of accuracy they ought to exclude all children under twelve, as being a section of the population which does not come under the operation of the criminal law, so far at any rate as imprisonment is

concerned. It would greatly enhance the value of the present excellent return if this improvement were adopted, and it is to be hoped that the Home Secretary will see his way to make a change which will show what is the ratio of imprisonment to the population liable to this mode of punishment, that is to say, to the population over twelve years of age.

We now come to the important question, why it is that the number of sentences to imprisonment have increased during the last three years. A continental statistician of considerable eminence (Dr. Starcke, I think) pointed out some years ago, in the *Bulletin of International Statistics*, that one of the results of war was to increase the volume of crime. Dr. Starcke produced a striking body of facts to show that after continental wars crime had always increased among the population affected by these operations, and in the absence of any other cause it is exceedingly probable that the recent Transvaal War has produced the same effects in this country, so far as regards the increase of crime, as continental wars have produced on continental communities. We cannot with impunity familiarise a population with the horrors of war. Constant tales of blood and slaughter, of disease and death, of the letting loose of the elemental passions of human nature, tend to deaden our higher susceptibilities and to excite the slumbering savage in the human breast. We have only to think of the pity and horror which the news of the first blood shed in South Africa aroused throughout the community, and of the comparative callousness to much greater loss of life which supervened at later stages of the conflict, in order to realise the brutalising effect which war produces on the population as a whole. A lowering of the general tone of the community during the war, combined with the discharge of a vast number of the actual combatants after its close, is quite sufficient to account for the rise in the prison

population which we have witnessed during the last three years. It is to be anticipated that this increase will be of a temporary character; the forces of civilisation and humanity will in time re-assert themselves and assume their old sway in the public conscience; but it must be recollected that a moral set back takes some time and effort to overcome, and until it has been overcome we must be prepared to face the unwelcome fact that there will be no diminution in the volume of crime. In making these observations I am well aware of the circumstance referred to by the Prison Commissioners, that an increase in social regulations, arising out of the growing complexity of social life, has the result of increasing the number of offences which come before the magistrates. I called attention to this fact more than thirteen years ago in a little book on Crime and its causes. But this increase in social regulations, whilst it increased the number of cases coming before the criminal Courts, did not increase the number of commitments to prison prior to 1901. Why is it that the number of commitments to prison has increased since 1901? That is the question which the Prison Commissioners have to answer. It is not answered by the quotation which they give us in their present Report from the Editorial Introduction to the Judicial Statistics for 1898. That Introduction was written at a time when commitments to prison were steadily diminishing, in spite of the continuous development of social legislation. There has been nothing abnormal in the social legislation of the last three years, and yet during that brief period commitments to prison and penal servitude have risen from 148,000 to 189,000 cases. I submit that the explanation of this extraordinary increase is not the explanation offered by the Prison Commissioners, but the explanation which I have already ventured to give, namely, the effects of war on the character and temper of the population.

The sudden rise in the prison population raises afresh the

serious question of overcrowding in prisons. Before the inquiry instituted ten years ago, of which Mr. Herbert Gladstone was Chairman, it was shown that some of the London prisons were at times seriously overcrowded, and when the Prisons Committee issued their Report they made several important observations and recommendations on this subject. "It has occasionally happened," the Report says, "that unusually large drafts of prisoners have had to be received, and in consequence Regulation 26 of Schedule I (of the Prisons Act of 1865) has not been adhered to. Ordinary prisoners have been placed in association, and although this may have been for only a single night, we are clearly of opinion that the margin of accommodation ought to be sufficiently ample to make these occurrences impossible. Prison officials, without exception, agreed that such association is most objectionable morally and physically, and we think that it ought not to occur either on reception or for the purpose of confinement during the night. We think that association in sleeping cells should not be allowed under any circumstances, except for medical reasons, and on the express recommendation of the medical officer. This rule should be rigidly adhered to." These are very strong observations on a vital point of prison administration, and it seems, from the figures relating to prison accommodation in the present Report, that overcrowding has again taken place in some of the London prisons.

Appendix No. 2, page 74, of the Commissioners' Report gives a statement of the amount of accommodation for prisoners in the various prisons and convict establishments throughout the country. In this statement we are presented with figures to show how many cells and rooms there are in each prison in which prisoners may be located. Along with this statement there is another, giving the greatest number of prisoners which have been committed to

each of the various prisons in the course of the year. According to the statistics recorded in these tables it is certain that overcrowding must have existed in some of the prisons within the Metropolitan area during the year 1903-4. At Holloway prison, for example, there are 846 cells and six rooms for the accommodation of female prisoners. But at one period of the year there were no fewer than 932 female prisoners in Holloway jail. In other words there were about 100 more prisoners than there was proper sleeping accommodation for. At Brixton prison there are 487 cells and five rooms for male prisoners, but at one period there were no less than 534 prisoners in this jail. At Wandsworth there is cell accommodation for 1,179 prisoners and nine rooms; but Wandsworth, at one time last year, had as many as 1,205 prisoners within its walls. Pentonville prison had also a larger number of prisoners than it had cell accommodation for, and Wormwood Scrubbs was the only prison within the Metropolitan area which was not overcrowded. It is no doubt true, as the Prison Commissioners remark, that the "high average prison population which has prevailed throughout the year has constituted a serious strain on the prison accommodation," and that the transfer of prisoners to alternative prisons is a serious inconvenience. But the inconvenience of transferring prisoners is not nearly so serious as an overcrowded prison, and there was accommodation in the country prisons for the surplus Metropolitan prison population if this accommodation had been properly utilised. It is very much to be regretted that so little was done to avoid the abominations which invariably arise from an overcrowded prison. With the exercise of proper care and forethought on the part of the Prison Commissioners, but more especially on the part of the Governors, overcrowding should have been guarded against, and ought never to have occurred. Overcrowding, as every prison official knows, quite disorganises the whole

‘‘ machinery of prison life. From a moral point of view it leads to evils of an unspeakable character, and after the serious observations on the subject submitted to the Home Secretary in Mr. Gladstone's Report, it was the hope of prison reformers that overcrowding had become a thing of the past. In this expectation events have proved that they were too sanguine. We once more see the old evils creeping back into our prison administration; our public officials are once more forgetting the lessons of the past; and the only method for mending matters is the cumbrous and wearing process of a fresh appeal to the public conscience.

The remaining portions of the Report follow closely on the lines of its predecessors, showing that good work continues to be done in many directions, especially in the treatment of juvenile offenders. All must hope that this work may be still further developed; and if it is developed on sound lines it is certain to meet with gratifying results.

W. D. MORRISON.

V.—CONFERENCE OF THE INSTITUT DE DROIT INTERNATIONAL AT EDINBURGH.

THE twenty-second session of the Institut de Droit International was held in September in Edinburgh, this being only the third occasion during the 30 years of its existence in which the Institute has met in Great Britain. The Conference cannot be said to have been greatly fruitful in definite and tangible results; but this is due largely to the fact that several questions upon which the Institute has been engaged for a number of years past had reached a conclusion, at least for the time being, and new work was being taken up. Further, the institution of the Arbitration Court at the Hague has in many respects created a new centre

with possibilities for future development; and the adjustment of new points of view which must follow in the case of more than one class of topics is necessarily a matter of time. The main work of the Institute has in the past been directed to the larger questions of International arbitration and the laws regulating the conduct of belligerents in war, although, in the domain of private International law, work of far-reaching importance has also been accomplished, notably in preparing the way by discussion and resolution for the work of the Hague conferences on private International law, which the Governments of the United Kingdom and of the United States of America have persistently refrained from countenancing in any way.

Arbitration.—In his interesting inaugural address Lord Reay, the President, sketched the recent progress of International Arbitration as evidenced by treaties, and pointed to the treaty between Denmark and the Netherlands as a remarkable advance, inasmuch as it does not make the usual exception to the subjects which are to be submitted, viz.:—such questions as concern the vital interests, the independence, or the honour of the contracting powers. “The governments of Denmark and of the Netherlands,” said the President, “had displayed much courage in being the first to establish a principle which, sooner or later, other governments might adopt in consonance with the pacific tendencies of the age.”

But the peculiar work of the Institute in the matter of arbitration has been of the practical nature of formulating and settling the rules of procedure to be followed. And its success in this is shown by the fact that the rules as agreed upon have been the basis of all discussions down to the Peace Conference of 1899. The principal matter before the present conference was the codification and co-ordination of the rules of arbitration, the discussion of which was introduced by Sir Thomas Barclay. In a long paper Sir Thomas

traced the growth of the arbitration movement since the Franco-German war, culminating in the erection of the Hague Court, and the success of recent negotiations for effecting arbitration treaties between the Great Powers, notably in the Anglo-French treaty. Sir Thomas also spoke hopefully of the agitation now in progress for bringing about a similar treaty between Great Britain and the United States of America. He proposed the formation of a permanent special committee for the purpose of dealing with the questions which arise out of the practice of the Hague Court, and also of a committee for the co-ordination of all the resolutions of the Institute with the view of framing a code of the principles of International law to which the Hague Court could refer. After considerable discussion, principally as to the scope of the committee to be appointed, it was ultimately agreed to appoint a committee to study permanent and general treaties of arbitration.

A long discussion took place at a subsequent *séance* as to whether the procedure applied at the Hague Court should come within the scope of the committee appointed to deal with the texts of treaties. Sir Thomas Barclay, who opened the discussion, urged that it was impossible to leave out the question of procedure. Indeed, the most practical work the committee could do was to deal with procedure. It was evident on reading the text of the Hague Convention that it had been hastily drawn up. It furnished merely the general outlines of what the procedure should be, the details being left to experience and practice. The committee would be able to render real service to the Hague by addressing itself to the completion of what had been rather hurriedly done at the Hague. Professor de Martens, Russia, was the next speaker. He said that many diplomatic notes had been drawn up in connection with cases with which the Hague Court had had to deal, and that those notes would be very valuable for the committee to consider. He agreed that

it was highly desirable that procedure should be carefully examined, and that it should be made a main part of the work of the committee. Professor Holland, Oxford, expressed doubts as to the propriety of enlarging the scope of the committee to the extent of including procedure, and submitted that if the jurisdiction of the committee were for the time being restricted to the text of treaties, precise work was more likely to be the result. If other questions were left to the discussion of the committee there was danger that important details might be neglected. Baron Descamps, Belgium, supported the view taken by Professor de Martens. Professor Pierantoni, Rome, also expressed the opinion that no limit should be placed on the scope of the work of the committee. After further discussion, Professor Holland announced that he did not insist on his view of the matter. It was then unanimously decided to include arbitral procedure in the work of the committee.

Neutrality.—Hitherto the work of the Institute has covered the whole field of International law relating to war, with the exception of neutrality. From their “annuaires” might be compiled a code of International law, with this exception. And, indeed, such a code has been compiled by Professor Holland, in his *Handbook on the Laws and Customs of War on Land*. But neutrality is a large exception, and the importance of questions as to the rights and duties of neutrals has been forcibly brought home to the mercantile communities during the present war between Russia and Japan. Questions as to the right of search, the equal treatment by belligerents of the vessels of all neutral powers, the placing of submarine mines, the destruction of prizes, the use of the harbours of neutrals, and many others, have lately been shown to be of vital importance; and the want of definite knowledge as to the rights of parties has given rise to irritation which might have been fraught with serious political consequences. At the last meeting of the Institute,

at Brussels in 1902, Baron Descamps opened the subject by submitting certain "*Thèses sur le pacigérat*." The discussion of the subject was begun at Edinburgh, when Baron Descamps emphasised the desirability of dealing with neutrality not as a negative but as a positive subject, not as a question of rights arising out of war, but as connected with the right to the preservation of peace. The Lord Chancellor expressed the same idea when he said: "Because two nations go to war they have no right to interrupt and interfere with the commerce of the world. They must recognise that people who are not engaged in the quarrel have a right to carry on their commerce." In accordance with this idea Baron Descamps proposed that non-belligerency should be termed "*pacigérat*," as more expressive of the actual position than "*neutre*." But this proposal was opposed by Professor Holland as uncalled for. Neutrality, he said, admirably describes a condition, the rights and duties attaching to which cannot be compressed into a definition, and still less can it be expressed by a single word such as "*pacigérat*." The "*Thèses*" of Baron Descamps found little support, and were negatived by the Conference; but no practical headway was made with the subject, largely owing to the want of a report from the Commission which had been appointed to consider the question, which would have formed a basis of discussion. The Conference, however, passed a resolution expressing its gratification at the initiative taken by President Roosevelt in reference to a Hague Conference, and its desire that the different States of the world should endeavour to regulate the subject of neutrality in a manner suitable to meet the needs of the present age.

At the last *sederunt* M. de Martens, St. Petersburg, made a statement with reference to President Roosevelt's proposal for the assembling of a second Peace Congress at the Hague. He recalled that on the 27th of February, 1904, the Russian

Government published a Ukase defining the conditions to be observed during the war, specially, declaring that commerce with foreign countries should go on as usual. In the Ukase there were embodied various declarations which were made at the Hague Conference, and these thus became obligatory for Russia. But some of these conventions which were agreed upon at the Hague were only concluded for a period of five years. These consequently expired in July of this year, and during the war they had not been renewed. M. de Martens alluded to the position with regard to prisoners of war. The Russian Government, in conformity with certain resolutions passed at the Hague Conference, made arrangements so that the names of prisoners should be sent to the Government of the country to which they belonged. This was done at first in an indirect fashion, but the procedure had now been simplified. There was a bureau of the Red Cross Society in St. Petersburg, of which M. de Martens was president, which could now communicate directly with a similar bureau in Tokio. He also stated that at the Hague Conference it was decided that certain instructions should be prepared by Governments for the use of their armies in accordance with the conventions agreed upon. The Russian Government had carried out that resolution by issuing two books. One was a copy of the conventions in question for the use of the officers, and the other took the form of a little catechism for the soldiers, telling them that their quarrel was not with the common people, and that they were to respect the churches and religious institutions. M. de Martens said he thought these facts would be useful for a further conference at the Hague, if it took place.

Private International law.—As is usual in such conferences the time at the disposal of members was ultimately found to be totally inadequate for the business to be overtaken; and many subjects of importance, such, for example, as

the conflict of laws in case of bankruptcy, had to be postponed to the next meeting, which is to be held at Ghent in 1906. In the realm of Private International law only two matters were fully discussed. A proposal was laid before the Conference for the formation of a special international tribunal for dealing with questions of Private International law arising out of existing international conventions, such as the Berne Convention relating to copyright, and the Industrial Property Convention relating to patents, trade marks, and trade names. The distinction between such a Court and the Hague Court would be that the latter dealt with questions between States, or, at any rate, involving the State as a party, while the former would deal with litigation between individuals of different nationalities arising out of international conventions. The general trend of opinion, however, was that it would be undesirable to create a new Court apart from the Hague Court, and a resolution, proposed by Professor Harburger, Munich, was ultimately carried in the following terms: "The Institute of International Law proposes that all cases of divergent interpretation of international conventions should be submitted by Governments to the decision of the Permanent Court of Arbitration at the Hague."

The subject of the conflict of laws relative to personal obligations was placed upon the "*ordre du jour*" of the Institute so long ago as the Copenhagen meeting in 1897. But it was not until the Edinburgh meeting that the matter was taken up and discussed. The report of a commission, which was presented by Professor Harburger, Munich, contained an examination under eight heads of the various laws which might be applied; and, as a conclusion, laid down as the general rule that questions as to such obligations should be determined by the law of the place where, at the time of entering into the contract, the debtor had his domicile, or—in the case of commercial transactions—his place of business.

This is of course a generalisation, and there must of necessity be many exceptions. Thus, in an agreement for the building of a house, the law which is applicable will naturally be that of the country where the house is to be built. And in the case of contracts made at market or on 'change, the *lex loci contractus* will obviously be that by which they are to be construed. Moreover, Professor Harburger's conclusion was made subject to the special proviso that (1) if the act which constitutes the fulfilment of the obligation is forbidden, and the obligation consequently null according to the law of the country where it is exigible, the obligation is altogether null; (2) questions of money, measures, weights, and other things of a like character in the execution of an obligation (*modalités*), are, in the absence of express stipulation, to be decided by the law of the place of execution; and (3) it may happen that if the obligation is to be fulfilled in the country where the contract was entered into or in another country, the obligation should be ruled by the law of that country. A *contre projet* was put forward by Professor Roguin, Lausanne, according to whom the regulating principle should be the intention of the contracting parties, giving a large discretion to the judge in determining this. The discussion was rendered somewhat involved by the introduction of cases where the obligation might be contrary to the public policy of one, of two competing countries, but it was decided, on the motion of Professor Fiore, Naples, to discuss the question apart from this exceptional case. Professor Pillet, Paris, proposed a resolution declaring that the ruling consideration should be the will of the parties "expressly or impliedly" declared; that, failing other evidence of such desire on the part of the contracting parties, the law of their common domicile should prevail, if they have a common domicile, and if not, of the place where the contract was entered into: but if circumstances should show that the place of entering into

the contract furnished no indication as to the wishes of the parties, the law applicable should be that of the place of execution. Professor Dicey supported the proposal of Professor Roguin, but thought that too large a discretion was left to the judge; and he proposed to substitute for the concluding portion a provision that, in the absence of circumstances indicative of a desire on the part of those contracting, the law of the place of entering into the contract should prevail. Professor Westlake pointed out that in the case of most contracts the law which governs them is not selected by the contracting parties, either expressly or impliedly, but is imposed on them; and he proposed to modify Professor Pillet's resolution by using the expression "implied by the nature of the contract." Subject to this, he supported the rule proposed by Professor Pillet. But it was found to be well-nigh impossible to deal satisfactorily with the subject by means of general affirmation. All the proposals laid before the meeting were negatived in turn, and the whole matter was sent back to the Committee for the purpose of having fresh proposals formulated for the next Conference.

M. Asser, Amsterdam, submitted an interesting communication upon the three Hague Conferences on Private International law held in 1893, 1894 and 1900, and the conventions following thereon. After describing the inception and methods adopted in summoning these Conferences, and in communicating their results to the various Powers who sent delegates to them, and commenting on the tentative character of what had actually been achieved, M. Asser proceeded more critically to examine "the factors which prevented continuity and tended to delay progress in bringing about a satisfactory understanding between the Powers, as to the rules to be applied in those matters which had been considered at the Hague, and which included marriage, divorce and separation, testacy, and succession.

These factors he found in the absence of a permanent character on the one hand and the want of independence on the other. With the view of increasing the utility of these Conferences he made the following proposals, viz. :—(1) The appointment in each State of a special commission charged with the preparation of conventions and their revision when necessary; (2) the institution of an international body, composed of members nominated by the different Governments and meeting at definite times; and (3) the clothing of this international body with authority to communicate directly with the special commissions of the different States without making their Governments the medium of communication, and without the use of diplomatic methods. Unfortunately, there was no time for a full discussion of these suggestions, and the matter was delayed. This is especially to be regretted, since it is a matter of importance that the work of these Conferences should be brought before the people of this country at a time when pressure is being brought to bear upon the Government to come into line with Continental countries, by sending delegates to the Conference, and putting the British view (in some of the questions differing radically from that prevailing on the Continent of Europe) prominently before those who represent sister nations.

It will be seen that the sum total of the Institute's work, omitting such formal business as its acknowledgment of Mr. Carnegie's gift of a Palais de Justice for the Hague Tribunal, is not of an imposing nature. A paper was read on the conflict of laws in matters of a criminal character, but no real progress was made with this subject which has been before the Institute now for many years. The discussion on neutrality barely touched the fringe of the subject. But the appointment of the Commission to deal with the text of treaties of arbitration and Hague procedure, is a matter which may be fruitful of much service, and the

discussion of the conflict of laws in regard to personal obligations has at least cleared the way for progress, by showing the weakness of generalisation in matters of infinite variety.

F. A. UMPHERSTON.

VI.—COMPARATIVE ROMAN LAW.

PART I.

IT may be useful to readers of the *Law Magazine and Review* to compile a list of works in which the Roman is compared with other systems of law. The comparison begins as early as Gaius and still continues. In this part only the English comparisons are named, others being left for a subsequent article.

In England attacks on the Roman system were made at early times, *e.g.*, by Walter de Map (*De Judicio Extremo*),¹ and by the barons in the Parliament of Merton in historic words. Notwithstanding this, the text writers, like Glanvill, Bracton, Britton, and Fleta, as well as John of Salisbury and the compilers of the *Leges Henrici Primi* and the *Dialogus de Scaccario*, show considerable acquaintance with at least the elements of Roman law. The first direct comparison—in a very vague way—is perhaps to be sought in Wyclif, especially in the *Tractatus de Officio Regis*.² In one of his English works he says that Roman law is heathen men's law.³ Littleton has one or two brief comparisons,

¹ *Judicabit judices judex generalis,*
Ubi nihil proderit dignitas papalis,
Ubi nullus Codici locus aut Digesti,
Idem erit dominus, judex, actor, testis.

(Other instances will be found in Selden, *Notes on Fortescue*, c. 33.)

² *Wyclif Society* (1887).

³ *Early English Text Society* (1880). See both these books *passim* for similar opinions.

e.g. sect. 187, where he states that English law is contrary to the Roman maxim, *Partus sequitur ventrem*. The earliest work of general comparison appears to be Fortescue, *De Laudibus Legum Angliæ*, probably written before 1470, the first edition being dated 1516. Sir John Fortescue is strongly in favour of the English rules where they differ from the Roman. In fact most English writers are, as might be expected. One of the few apologists of Rome is Sir R. Wiseman, *Law of Laws* (1686), the writer going so far as to uphold the procedure by torture as a means of obtaining truth. Another is T. Starkey, England,¹ who makes Cardinal Pole one of the characters in a duologue, and as such argue for the reception of the Roman law.

After Fortescue the mass of literature may be divided into two classes: (1) General comparison; (2) Particular comparison. The second class is far the more numerous. In some works of this class the *usus modernus* of technical terms of another system has been carried rather far, as in the use of the word *Eirenarcha*, which Lambarde uses in his work of that name (1581), as equivalent to a justice of peace, and in the word *decaprotus*, which is regarded as the counterpart of headborough, and *angaria*, which has been identified with purveyance.

(1) *General comparison*.—Coke, the great master of the Common law, to whom it was “the perfection of reason,”² treats the Roman law with more or less contempt. In few cases does he make any direct comparison. A striking instance is in Co. Litt., 137b, where he says, “Herein the Common Law differeth from the Civil Law, for *libertinum ingratum leges civiles in pristinam redigunt servitutem; sed leges Angliæ semel manumissum semper liberum judicant gratum et ingratum*.” The main other works of general

¹ *Early English Text Society* (1878), p. 192.

² Co. Litt., 97b. Compare the hexameter at 395a. *Lex plus laudatur quando ratione probatur*. Coke had all Aquinas' faith in *ratio*.

comparison are in chronological order: Fulbecke, *A Parallele or Conference of the Civil, Canon, and Common Law* (1601 and 1618); J. Cowell, *Institutiones Juris Anglicani ad Methodum et Seriem Institutionum Imperialium Digestæ* (1605, an imitation of the arrangement of the *Institutes* of Justinian);¹ Sir T. Smith, *Republic* (1640); Booth, *Examen Legum Angliæ* (1656); Arthur Duck, *De Usu et Autoritate Juris Civilis, Romanorum per Dominia Principum Christianorum* (1654, see especially Book II, c. viii). In the following century we meet Domat's *Civil Law* (translated by W. Strahan), with *Additional Remarks on some material differences between the Civil Law and the Law of England* (1722); Wood, *Institute of the Imperial or Civil Law* (4th ed., 1730); S. Hallifax, *An Analysis of the Roman Civil Law compared with the Law of England* (1st ed., 1774; the same edited by Dr. Geldart, 1836). To the nineteenth century belong Browne, *View of the Civil Law* (1802); C. Butler, *Horæ Juridicæ Subsecivæ* (1804). These were followed by the vast work of Sir P. Colquhoun in four volumes, *Summary of the Roman Civil Law, illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English, and Foreign Law* (1849—1860); Lord Mackenzie, *Studies in Roman Law, with comparative Views of the Laws of France, England, and Scotland* (1st ed., 1862; 7th, 1898); J. Williams, *Institutes of Justinian illustrated by English Law* (1883 and 1893); H. T. Terry, *Some leading Principles of Anglo-American Law* (1884); J. F. Dillon, *Laws and Jurisprudence of England and America* (1894); W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America* (1896); J. Bryce, *Studies in History and Jurisprudence* (1901), most of the essays, where they deal with Roman law, being comparative. In a lighter

¹ Like Wiseman, though not to such an extent, Dr. Cowell was an apologist for absolutism. The fate of his work, *The Interpreter*, is well known to students of constitutional history. Allen on the Prerogative has some leanings the same way, no doubt influenced by Blackstone's very high opinions on the subject.

vein Dr. Goudy's translation with notes of Jhering's *Law in Daily Life* (1904), should not be omitted.

(2) *Particular comparison*.—Only a selection from the large number of books and periodicals can be given. The importance of the law of sale has produced two books of the first rank, both published in the same year: J. B. Moyle, *Contract of Sale in the Civil Law* (1892), and J. Mackintosh, *Roman Law of Sale with modern Illustrations* (1892).¹ An early work dealing with marriage is Swinburne, *Treatise on Spousals* (1686). Usury is the subject-matter of Bellot and Willis' *Law of Unconscionable Bargains* (1897). An old comparative work on Maritime law is that of A. C. Schomberg, *Treatise on the Maritime Laws of Rhodes* (1786).² Of a similar nature is H. Rolin's *L'Abordage* (1899). In procedure H. Speyer, *Les Vices de notre Procédure en Cours d'Assises* (1898), contrasts the Roman and English rules of evidence, much to the advantage of the latter. *Best on Evidence* also contains a good deal of comparison. The debt of Constitutional law to the jurists of the Empire is considered by Allen, *Enquiry into the Rise and Progress of the Royal Prerogative* (1831), the writer maintaining that the royal power in England developed from the conceptions of the Roman Empire. The difficult question of the Teutonic or Roman origin of bailments has been treated in a different way by two writers of such eminence as Sir W. Jones and Mr. Justice O. W. Holmes. The former, in his *Essay on the Law of Bailments* (1781), asserts that "a perfect harmony subsists on this interesting branch of jurisprudence in the codes of nations most eminent for legal wisdom, particularly of the Romans and English" (p. 11). Mr. Justice Holmes on the other hand, in *The Common Law* (1882), claims for the

¹ The comparison has been suggested by Benjamin in his work on Sales, but it is short and fragmentary.

² On the adaptation of the *Lex Rhodia* to England, see the judgment of the Earl of Halsbury, L.C., in *Ruben Steamship Co. v. London Assurance* [1900], A. C. 1.

English law of bailment a purely Teutonic origin.¹ As to contract and tort in general the well-known works of Sir F. Pollock on those subjects provide several instructive comparisons. For Criminal law, in addition to Sir J. F. Stephen's *History of the Criminal Law*, Sir G. Bowyer's *Readings* (1851), may be consulted. He thinks that we have much to learn in some respects from the Roman system. The first chapter of Sir E. Fry's *Specific Performance* is to the effect that the doctrine is canonist rather than Roman. In real property Professor W. J. Ashley, in his *Origin of Property in Land* (1891), a translation with additions from Fustel de Coulanges, makes instructive, if not always acceptable, comparisons between the Roman and English land laws. Mr. Goffin, *Testamentary Executor in England and elsewhere* (1901), has an interesting chapter on testamentary execution in Roman law. M. Edouard Lambert is a strong supporter of the comparative method. In *La Tradition Romaine* (1901), he compares the Roman and English law as to delivery, and in *La Fonction du Droit Civil Comparé* (1st series; 1903), he does the same for succession. From New Orleans comes H. Dennis' *Treatise on the Law of the Contract of Pledge as governed by both the Common Law and the Civil Law* (1898).

In addition to these works and monographs there are numerous articles in periodicals where comparison is attempted, especially in those periodicals which deal especially with comparative jurisprudence, such as the *Journal of Comparative Legislation*, *La Revue de Droit International et de Jurisprudence Comparée* (Brussels), *Le Journal du Droit International Privé et de la Jurisprudence Comparée*, the *Zeitschrift für vergleichende Rechtswissenschaft*, and the *Jahrbuch der Internationalen Vereinigung für Verg-*

¹ Lord Esher, in *Nugent v. Smith*, 1 C. P. D. 28, follows Sir W. Jones as to the Roman origin. Sir W. Jones adopts Lord Holt's view (with some exceptions) as laid down in *Cogg v. Bernard*, Ld. Raym. 912.

leichende Rechtswissenschaft. The foreign periodicals do not as a rule deal much with English matters. An exception is an article by Professor Bekker in the *Jahrbuch* for 1897, comparing Roman *æquitas* and modern equity. Among numerous articles in English periodicals may be named the following. It is only a selection, as a full bibliography would need immense research and unlimited space. P. Cobbett, "Partnership in English and Roman Law," (*L. M. and R.*, 1887); T. C. Williams, "The Terms 'Real' and 'Personal' in English Law" (*L. Q. R.*, 1888); E. C. C. Firth, "The Quasi-Grant of Easements in English and Roman Law" (*L. Q. R.*, 1894); W. H. Griffith, "*Allen v. Flood*, Sidelights from Roman Law" (*Journal of Comparative Legislation*, 1899); M. de Villiers, "Malice in the English and Roman Law of Defamation" (*L. Q. R.*, 1901). References to the indexes of these publications will no doubt bring to light many more articles of a similar nature.

Nothing has been said in this place of the numerous works dealing with the influence of Roman law on English law from William Burton¹ downwards. The valuable work of Mr. Scrutton² is the most fertile in results. Among others who have treated the matter more or less fully may be named Craig, *Jus Feudale*; Selden, *Dissertatio ad Fletam* and notes on Fortescue, Hale, Blackstone, Savigny, Güterbock, Sir F. T. Palgrave, Spence, Sir Travers Twiss, Sir Henry Maine; Coote (*Romans of Britain*); Sheldon Amos, Finlason, (*Introduction to Reeves*); Caillemer; and of more recent writers, Mr. F. Seeböhm, Sir F. Pollock, and Professors Maitland³ and Grueber. The question of the influence of Roman law on maxims and decisions has been already dealt with in the *Law Magazine and Review*.⁴—JAMES WILLIAMS.

¹ *Commentary on the Itineraries of Antoninus* (1658).

² *Influence of the Roman Law on the Law of England* (1885).

³ Especially *English Law and the Renaissance* (1901), where the learned writer gives the reasons why Roman law was not received in England.

⁴ August 1895 and February 1904.

VII.—CURRENT NOTES ON INTERNATIONAL LAW.

The Russian Volunteer Cruisers.

THE increased activity of the Russian cruisers in searching neutral commerce in the present war has drawn attention to several important points of the law of neutrality. The status of the Russian Volunteer Fleet, the various official definitions of contraband, the destruction of neutral ships, the internment of belligerent ships of war taking refuge in or visiting neutral ports, and hostilities between belligerents in neutral ports, are questions which have thus been raised, and which will form precedents for the future.

The first question, raised by the capture of the British mail steamer *Malacca* by the Russian Volunteer cruiser *Smolensk* in the Red Sea, has been by implication answered in favour of the neutral, the Russian Government waiving the further exercise of the right of search by such ships. These ships are admitted to have passed the Dardanelles in the character of auxiliaries to the Russian fleet, and to have only assumed the character of ships of war outside territorial waters. It hardly requires to be restated at this time of day that by the treaties of 1841, 1856, 1871 and 1878, Russia and Great Britain have undertaken to respect the closure of these Straits to foreign ships of war as "the ancient principle" of the Turkish Empire, the only exceptions to the rule being the reservation by the Porte of the right to grant passage to the "light-armed vessels" in the service of the foreign legations at Constantinople, and to "ships of war of the friendly allied powers in time of peace where this is necessary to safeguard the execution of the stipulations of the Treaty of Paris." The fact that this transformation of these ships has taken place constantly during the last twenty years by arrangement between Russia and Turkey is an argument against, and not for, the right of these

ships to enjoy the full status of ships of war. The protest recently made by our Government against the Russian torpedo boats, though disarmed and sailing under the commercial flag, passing through the Straits (see these Notes, Vol. XXVIII, 216), showed that it does not regard the use of the commercial flag as justifying the passage of a ship of war. It may be that these Volunteer cruisers are to be regarded as incorporated in the Russian Navy by reason of the conditions of their employment, and not only by conversion into public ships on the outbreak of war, as Hall thought (549): and that it is not a necessary condition of the status of a ship of war that it should sail commissioned as such from its country, but it may be bought from a foreign country and taken over by the purchasing Government at sea. As against a ship belonging to a country not signatory of the Turkish treaties with regard to these Straits, it is a question whether the action of the Volunteer cruiser would be justifiable. The breach of a treaty between States A and B does not affect the belligerent rights of A against C, nor perhaps does it invalidate the status of A's ships of war as against B's ships. But it gives B the right to refuse to recognise the exercise of belligerent rights against its shipping, which has only been rendered possible by a breach of treaty. If the *Smolensk* had come from the Baltic instead of by a treaty-bound channel, the larger question of its status under all circumstances might have had to be considered.

Contraband.

The antagonism between the Russian conception (on the present occasion) of contraband and the accepted views of Great Britain and the United States, has been brought out by the capture and condemnation at Vladivostok of the *Allanton* and *Arabia* and other ships. The *Allanton* sailed from Muroran for Singapore with coal consigned to British

merchants at Singapore, and was captured on a direct course for the latter port. In the case of the *Arabia* a cargo of railway material and flour belonging to American subjects, destined to Japanese ports, and addressed to various commercial houses there, was condemned as contraband; and this produced a protest from the United States Government. The Russian Declaration at the beginning of the war declared as "absolutely contraband, telegraph, telephone, and railway materials, and fuel of all kinds, without regard to the question whether destined for military or for purely pacific and industrial uses:" and "as contraband all articles destined for war on land and sea, as well as rice, provisions and horses, beasts of burden, and others capable of serving a warlike purpose, and if they are to be transported on account of or to the destination of the enemy." Mr. Hay's Note (of August 30th) states that his Government cannot recognise the principle of the decision, and lays down as the criteria of contraband "warlike nature, use and destination. Articles which, like arms and ammunition, are by their nature of self-evident warlike use, are contraband if destined to enemy's territory, but articles which like coal, cotton and provisions, though ordinarily innocent, are capable of warlike use, are not subject to capture and confiscation unless shown by evidence to be actually destined for naval and military forces of a belligerent. This substantive principle of the law of nations cannot be overridden by a technical rule of the Prize Court that the owners of the captured cargo must prove that no part of it may eventually come to the hands of the enemy's forces. The proof is of an impossible nature; and it cannot be admitted that the absence of proof, in its nature impossible to make, can justify the seizure and condemnation." (*Standard*, September 21st.) Mr. Balfour has stated the view of our Government to be that "warlike stores carried to a belligerent, coal carried to

a belligerent for the purpose of aiding him in his warlike operations, and foodstuffs carried to an enemy in the field or a beleaguered fortress to aid the troops or fleet, are contraband; but coal, cotton, foodstuffs or any other things are not absolute contraband, and the mere fact that they are found on board a ship does not justify their seizure, and in certain cases the capture, confiscation, and detention of the ship." As pointed out by Mr. Hay, the Russian definition of contraband obviates the necessity for a blockade, and means, if completely executed, the complete destruction of all neutral commerce with the non-combatant population of Japan. These objections are not quite satisfied by the intimation of the Russian Government that foodstuffs will in future be treated as conditional contraband,—and that the rule casting the proof of innocent destination on the owner shall be applied as leniently as possible (no change being made as to coal and cotton). It will, however, be remembered that our own rule of evidence casts the burden of proof of neutrality on the claimant (Phillimore, sect. 480). The Russian attitude with regard to coal is in direct conflict with her declaration of 1884, at the West African Conference, that she would never recognize coal as contraband. While no doubt a State may define contraband differently on different occasions to suit the particular circumstances of the warfare it is engaged in, it cannot expect other States to acquiesce in its refusal to recognise the general rules governing the subject which it has formerly adopted, and which stand on a basis of general acceptance in practice. (See this Magazine, Vol. XXIX, 179.) The reversion by France, in its war with China in 1885, to the older idea that foodstuffs with a general commercial destination in the enemy's country can be contraband, was met by a protest by our Government, and though it was not withdrawn, still, as no occasion arose to apply it, it can be disregarded as a

precedent. It seems a pity that in the present war neutral States, who were not prepared to accept the rules laid down in the belligerents' declaration as to neutrals, did not formulate their objections at once without waiting for events to show if it would be necessary or not. As regards the neutrals' duty with regard to contraband, it is to be noted that Germany, who in her war with France in 1870 protested to our Government against any exports of coal being allowed to France, has not prevented her subjects on the present occasion from supplying coal direct to the Russian Fleet at sea. The British Government prohibited this being done for the French North Sea Fleet in 1870, and has done so for the Russian Fleet on the present occasion.

Destruction of Neutral Ships.

The sinking of the British ship *Knight Commander* by a Russian man-of-war on the ground of her having contraband on board, and of its inability to furnish a prize crew to take her into port for adjudication, is one *primæ impressionis* at least in recent times. Destruction of an enemy's ship by a cruiser which, owing to the large number of prisoners, could not spare a prize crew to navigate the ship which had neutral property on board, has been recognised as legitimate, and as giving no right of compensation to the neutral cargo owners in France (Hall, 476, 744). But the two cases are subject to different conditions. In the former case the property in the vessel remains with its owner till condemnation, in the latter it vests in the captor on capture. On several occasions English Prize Courts have held that destruction of prizes from motives of necessity is legitimate and even a laudable act of duty: in their war with Great Britain, 1812—1814, the American Government gave instructions that this should be systematically done, and Hall thought that though the English and French practice has always been

to bring in prizes unless there is strong reason against it, the future tendency will probably be the other way, for the reason given above, and the unwillingness of neutrals to admit prizes to their ports (447). The Institute has also formulated conditions on which a captor may destroy a prize, all founded on military necessity. But an obvious argument against this is the probability of there being neutral goods on board, as they have a perfect right to be in safety under the Declaration of Paris, and the danger of encouraging indiscriminate destruction of property and possibly life. These apply, *à fortiori*, in the case of neutral ships, and neutrals should have a right to insist on the integrity of their property, or equivalent compensation if they are deprived of it otherwise than by judicial sentence. In many cases actual inspection of the ship and cargo may be necessary, besides examination of the ship's papers and the crew's evidence. Lord Stowell held in the Prize Court that English captors destroying a neutral ship, either wantonly or under alleged necessity in which she is not directly involved, are liable not only for full compensation but also for damages and costs: and that the gravest importance of such an act to the captor's own State will not justify its commission. Undoubtedly, a contributory cause for this course being taken is the difficulty of a belligerent taking his captures to his own ports when, as in the present case, the distances are so great. The suggestion has been made (by the President of the Institute) that under the circumstances the older practice might be revived of the belligerent being allowed to take his captures into neutral waters (*see* Taylor, 639), and even being allowed to hold Prize Courts in neutral waters. It is to be remembered that the condemnation of a capture, by a regular Prize Court sitting in the country of a belligerent, of a prize lying at the time of sentence in a neutral port is irregular, but clearly valid, in English and American prize law (Phillimore, III,

sect. 379) : but their Courts and Executives have always refused to recognise the validity of a condemnation pronounced in a neutral port by an officer of the belligerent State as "an attempt to exercise the rights of war within the bosom of a neutral country" (Lord Stowell). In principle there would seem to be no objection to a Prize Court being constituted in a neutral country, *e.g.*, Egypt, to hear the cases of Russian captures in the Red Sea : but this would only be possible if the members of the Court were international jurists of recognised authority, and included neutral as well as belligerent representatives. In certain countries, if the prize was a ship of the neutral State within whose jurisdiction the captor brought her, the local Courts might claim jurisdiction, though jurists are divided in opinion as to the correctness of this ; and it seems that English Courts would certainly assume jurisdiction over an English vessel brought in as a prize. (Phillimore, III, sects. 164, 374.)

Internment of Ships of War.

The recent maritime operations of the war have produced an unusual situation in International law—internment of belligerent ships of war in neutral ports to which they had gone for repairs or to escape capture. Russian ships of war, owing to their remoteness from their own bases, in their supervision of neutral shipping, have been obliged to resort to neutral ports ; and the authorities at San Francisco, Kiaochau and Shanghai, and in Spain, have insisted that the Russian men-of-war sheltering or repairing there shall only be allowed a short time for repairs, and if remaining after that time (generally put at twenty-four hours), shall be disarmed and detained during the continuation of hostilities. The idea of the twenty-four hours' limit seems to have originated in the generally recognised rule that twenty-four hours shall elapse between vessels of two opposing belligerent

States leaving a neutral port: and in the practice of Great Britain during the American Civil War of 1861, and the Franco-German War of 1870, of requiring every belligerent man-of-war to leave an English port within twenty-four hours after entering it, "except in case of stress of weather or of her requiring provisions or repairs." This has since been adopted by the United States and others, and was considered by Hall as likely to become a general rule (653). The present extension, however, is a great advance on this, as it applies the twenty-four hours' rule to the stay of a belligerent warship under all circumstances, even for repairs. Hall's view (650) was that the case of land internment was different from that of ships entering a neutral port, and that belligerent ships could stay any length of time for making good defects, ascribing this difference to the fact that harbours in peace are generally open to public foreign ships, and that the inevitable conditions of navigation require that a less strict criterion of neutral conduct shall be applied. But there seems to be no more reason for allowing a neutral port to become an asylum for a defeated fleet, or a base at which he can prepare to fight again, than for allowing a neutral country to shelter a defeated enemy. This is likely to be supported by the great body of neutral opinion, as making for curtailment of naval warfare and the consequent dislocation of trade, though it may press hardly on a State which has naval bases few or remote from the scene of hostilities. There seems, therefore, to be a good prospect of this becoming a rule of International law (Taylor, sect. 636).

Hostilities in Neutral Ports.

The seizure of the Russian torpedo boat *Reicheltsefni* by the Japanese in the harbour of Chifu, where she had taken shelter, presents a *prima facie* case of violation of neutral territory, for which, in the ordinary course, China would

have required satisfaction. The circumstances of the present war, however, are peculiar, seeing that it is being fought in Chinese territory between two other Powers; and though on this occasion the hostile act was committed in a port where warships of other powers were present, the injury, if any, is done to China only, and the neutral Powers who have treaty rights and interests in China may be trusted to see that her territorial sovereignty is not impaired by hostile acts endangering those interests. Still the seizure seems hardly justifiable, even if the captured vessel was (as alleged) unduly prolonging her stay in the neutral port, for the twenty-four hours' rule is as yet one for the discretion of each Power with regard to belligerent ships in their waters. But a claim by Russia against China for compensation in this respect is open to the "exception" that the Russian ship resisted capture. Though the authority of Story supports the proposition that such resistance is justifiable (*The Anne* [1818], 3 Wheaton, 447), a contrary precedent is afforded by the decision of Louis Napoleon when French President, in the case of the *General Armstrong* in 1814, submitted to his decision in 1851 by the United States and Portugal. There an American privateer in Fayal harbour, in expectation of an attack from a British squadron sent after her and actually in the harbour with the design of attacking her, was abandoned and destroyed by her crew; and the United States' claim against Portugal for compensation was rejected on the ground of the ship having taken the law into her own hands instead of leaving the responsibility to the territorial sovereign (Hall, 648; Phillimore, sect. 374).

A Second Hague Conference.

The announcement of President Roosevelt's intention to propose a second Hague Conference at the end of the present war, can hardly be received with surprise in view of the unmistakable international acceptance of the new

state of things inaugurated by the first Conference. Short-comings in detail have already been indicated by jurists in the scope of the Arbitration and War Conventions, which require revision; and it does not seem that our Government for one has yet given effect to the latter in any new Army Regulations, though other Powers have done so. But the principal reason for a second meeting of the States is no doubt the hope that the time is approaching when the optional character of the resort to the Hague Tribunal may be replaced, at least in all but a few defined cases, by an obligatory submission to it. Up to the present time Great Britain has concluded treaties of obligatory arbitration on all questions of "a judicial nature or relating to the interpretation of treaties not affecting the vital interests, independence, or honour of the parties or the interests of third parties" with France, Germany, Spain, Italy, and Norway and Sweden. There are similar treaties between France and Italy, Chili and Argentina, Spain and Mexico, and between Argentina, Bolivia, Domingo, Guatemala, Salvador, Paraguay, Mexico, Peru and Uruguay, while Holland and Denmark have concluded a treaty referring all differences, without exception, to arbitration. The United States have a peculiar right to take the initiative in this matter, seeing, as was pointed out by Dr. Evans Darby, Secretary of the London Peace Society, at the recent Boston Peace Conference, that it was owing to President Roosevelt's insistence that the latest Venezuelan question was referred to the Hague Tribunal; and previously to that the United States and Mexico set the Court in motion with the California Pious Funds Case. In the former case it will be remembered that the blockading Powers, England, Germany and Italy, showed themselves by no means inclined to give the Court jurisdiction, but its judgment at least showed that they had no reason to regret having done so.

Morocco.

It is announced that France and Spain have concluded an agreement with regard to Morocco which supplements our own general treaty of arrangement with France. The unofficial version of its effect (which seems to be confirmed) is, that it divides Morocco into French and Spanish spheres of influence, Spain having assigned to it the northern coast and portion of the country except Tangier, while France takes the whole of the *Hinterland* right across to the Atlantic coast by Mogador. Both countries, however, undertake to preserve the integrity of Morocco under the sovereignty of the Sultan: and the treaty rights of other countries are not affected. Our commercial treaties with Morocco date back to 1721, the present one being that of 1856: and there is a Convention to which all the Powers are parties, made in 1880, giving rights of protection and exemption from taxation to *protégés* and dependents of their respective diplomatic representatives in the country.

Diplomatic Privilege.

The case of Mr. Gurney, Attaché of the British Embassy at Washington, who refused to acknowledge the jurisdiction of a Massachusetts Justice to fine him for driving a motor at an illegal speed, has been settled satisfactorily by the American Government remitting the fine imposed for the offence and expressing its regret for the occurrence. There is no doubt on the precedents that members of a diplomatic suite are not amenable to the local criminal jurisdiction in person or property, except perhaps in case of extreme gravity affecting the State to which their chief is accredited; and the recognised remedy for an abuse of this privilege is for the Government of that State to apply for the recall of the offender or to order him to leave the country. This privilege cannot, it is said, be waived by a member of the

suite, but only by the Minister, and he cannot do so in the case of a person appointed by his Sovereign. In the United States it seems that the consent of the party's Government is also required (Phillimore, II, sects. 186, 187; Hall, 181): where it has been held that an assault by a foreign Minister entitles the sufferer to retaliate in self-defence though not to bring legal process against him. (Phillimore, II, sect. 171.) Servants of an Ambassador stand on a different footing, and by leave of the Ambassador can be made amenable to the local law, and in England without such leave if engaged in trading. (Vattel, Part IV, chap. 9, sects. 122—124: Wheaton, Part III, chap. 1, sect. 16: Hall, 185: Taylor, 299.)

Recent Cases.

In *Board of Trade v. Abrahams* (20 Times L. R. 684), under sects. 218, 219, of the Merchant Shipping Act 1894, in the case of a ship belonging to a foreign country to which the Act has been applied, it has been decided that if such a ship arrives at a British port and her crew have signed for a voyage to that port and further, a person unauthorised by law cannot go aboard the ship there without the master's permission before the crew leave the ship.

In *Duval v. Gans* (*ibid.* 705), service of process out of the jurisdiction was allowed against a person abroad in the case of a contract which ought to be performed within the jurisdiction, although it is not expressly mentioned in the contract that it is to be performed there.

In *Embiricos v. Anglo-Austrian Bank Limited* (*ibid.* 794), a conflict of laws as to a cheque was the question for solution. A cheque was drawn in Braila in favour of the plaintiff of a London bank, and endorsed by him abroad to a person carrying on business in London. The cheque was stolen from the plaintiff's office abroad and taken to Vienna, where an endorsement was forged, and it was then

paid to a banker there, who innocently and properly paid its value and then endorsed it to the defendant's bank in London. By Austrian law the endorsement, though forged, and the transfer of the cheque in Vienna, passed the property in it, while in English law a forged endorsement passes no rights. It was held that Austrian law governed the transfer in Vienna and the defendant bank had a good title to the cheque.

G. G. P.

VIII.—NOTES ON RECENT CASES (ENGLISH).

THE slackness of business on the Chancery side shows itself in the slimness of the Chancery reports. All the decisions which the reporters have thought worthy of record during the months of August, September and October, are set out in 292 pages of the *Law Reports*. And few of these decisions are of any great interest or importance.

In this connection it may be permissible to suggest, for the consideration of the powers that be, a small, but we hope useful, reform. When Chancery judges are unable to find work in their own Courts, the only way of making them useful now adopted, is to send one or two of them over to try King's Bench actions. This means that they are set to deal with matters as to which they have no experience, assisted by counsel with whom they have no acquaintance. Meanwhile the King's Bench, which is chronically unable to deal with the volume of business within its own jurisdiction, is struggling with matters properly within the jurisdiction of the Chancery Division. Perhaps the more important of these matters are questions relating to death duties and appeals in equity cases from County Courts. No solicitor thinks of consulting a Common law counsel as to the incidence of death duties, but when the matter on which equity counsel has advised comes to be decided, it is decided

by a Common law judge. Again, one reason (and the chief one) why relief in equitable matters is so seldom sought in County Courts is, that the appeal from the County Court's decision is to a Court of Common law. A similar state of affairs obtained until lately as to Company litigation. The slackness of business in the Chancery side, which led to the transfer of these cases to the Chancery Division, may perhaps have the further benefit of transferring the matters here referred to also to that division. It is, as the proverb says, an ill wind that blows nobody good.

None of the reported cases in the House of Lords has much interest for the Chancery lawyer. *Winans v. Attorney-General* (L. R. [1904], A. C. 287), in which the Lords reversed the decisions of both the Court of Appeal and the Divisional Court of the King's Bench, turned absolutely on a point of fact. The law, as stated by all the Courts which heard the case, was identical; the real difficulty was—as it is in nearly every case where the question relates to a person's domicile—as to the true inference to be drawn from the proved facts. All the same, the House of Lords did a good service in drawing attention to a point not sufficiently insisted upon in the Courts below; that point is, that the burden of proving that the domicile of origin has been abandoned, lies upon the person who asserts that a foreign domicile has been acquired. Lord Macnaghten's statement of the law (at p. 292) is, as his Lordship's statements of the law almost invariably are, worth the attention of those who wish to learn how to make abstract principles of law intelligible to the average educated man—a thing little studied and still less understood in this country. Probably in the whole world it would be impossible to discover a citizen so absolutely ignorant of the laws which he is bound to obey as a British citizen. This is unquestionably due not so much to the fact that English Law is not codified,

as to that more melancholy fact that the average English lawyer expresses himself in such a way that no human being, not having a legal training, can possibly understand what he is talking about. •

The only other House of Lords' case of any interest is *McCartney v. Londonderry and Lough Swilly Railway Company* (L. R. [1904], A. C. 301). There is nothing new in the case, which merely re-affirms what has long been recognised as settled law. Nevertheless the case is interesting, if it were merely for the delightfully succinct and clear principle stated (as in the previous case) by Lord Macnaghten. The facts shortly were, that the defendants claimed the right as riparian owners to abstract water from a natural stream for the purpose of working their railway. Holmes, L.J., held that they were not. The Irish Court of Appeal held that they were, provided the amount abstracted was not such as to inflict sensible injury on the other riparian owners. The House of Lords reversed the Court of Appeal. The whole law on the subject is stated by Lord Macnaghten in a paragraph which lawyers should all commit to heart: "There are, as it seems to me, three ways in which a person whose lands are intersected or bounded by a running stream may use the water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes, and the wants of his cattle. He may use it also for some other purposes—sometimes called extraordinary or secondary purposes—provided those purposes are connected with or incident to his land, and provided that certain conditions are complied with. Then he may possibly take advantage of his position to use the water for purposes foreign to or unconnected with his riparian tenement. His rights in the first two cases are not quite the same. In the third case he has no right at all." The use of the water for ordinary purposes is unlimited: it

may extend to the absolute exhaustion of the stream. The use for extraordinary purposes must be reasonable. And, as said, there is no right whatever to the third use. This decision of Lord Macnaghten may be put beside that of Lord Cairns, in *Swindon Waterworks Co. v. Wills and Berks Canal Navigation Co.* (L. R., 7 H. L. 697), as the simplest and clearest statement possible of the law as to water rights.

The late Mr. H. W. Challis was, in justification of his taste for the antiquities of law, fond of citing Lord Coke's remark: "There is no knowledge, case, or point in law, seem it of never so little account, but will stand our student in stead at one time or other, and therefore in reading nothing to be pretermitted." This is well worth attention now that so many real property lawyers deprecate any interest on the part of their pupils as to the ancient Common law rules for the limitation of future estates. A great conveyancer lately told a student that there were now no such things as contingent remainders. That remark, even if only intended to apply to interests created since the Contingent Remainders Act 1877, is not correct. But that everyone must know the distinction between contingent remainders and executory interests is made clear by cases reported almost every month. The last of these is *In re Wrightson* (L. R. [1904], 2 Ch. 95). There a testator devised freeholds in strict settlement to various devisees. By a codicil he directed that no devisee should have a vested interest in the freehold bequeathed him until he attained the age of twenty-four years. Now if the limitations to the unborn children were regarded as contingent remainders, their validity would have depended upon whether or not the children had in fact attained the age of twenty-four before the death of their parents who held the life estates. If, however, they were executory interests, they were void *ab initio* as contrary to the rule against perpetuities. The

Court held that they were executory interests, and accordingly failed. For an example of interests being held good because they were *not* contingent remainders but executory interests, see *Blackman v. Fysh*, (L. R. [1892], 3 Ch. 209).

The decision in *Moseley v. Koffyfontein Mines, Limited* (L. R. [1904], 2 Ch. 108), is one which, independently of the motives or facts in that particular case, conduces to honesty in the matter of company promotion and company proceedings generally. The facts there were that the defendant company issued debentures for £100 at the price of £80. The debenture holder was entitled not merely to be paid £100 when the debenture came to be paid off, but at any time before that he was entitled to claim in exchange for his debenture a fully paid £100 share in the company. Buckley, J., held that this transaction was valid. The Court of Appeal reversed his decision, on the ground that in fact the transaction amounted to giving the debenture holder an option to take shares in the company at a 20 per cent. discount. Is it too much to hope that the observations of Vaughan Williams, L. J.,—based as they are on a most profound experience of company affairs—as to the advisability of making the full nominal value of shares payable in cash and in nothing else, shall be gravely considered by those responsible for the trading laws of the country?

The deluge of decisions reported by the various reporting agencies, seems at times to overwhelm us. Yet, strange to say, cases constantly occur on which there must in the nature of things have been previous decisions, and yet the reports give no guidance as to what such decisions were, or as to whether there ever were any or not. Two cases vividly illustrate this point. In *In re Poole and Clarke's Contract*

(L. R. [1904], 2 Ch. 173) a question arose as to what the form should be of a conveyance of a freehold, held subject to restrictive conditions, as respects the indemnity which in reason the vendor of such freeholds is entitled to from the vendee. There was found to be absolutely no authority on the point. At the suggestion of Romer, L.J., the vendee agreed to covenants to observe and perform the restrictive covenants and to indemnify the vendor subject to the following restriction, "with the object and intention of affording to the vendor, his heirs, executors and administrators, a full and sufficient indemnity in respect of the restrictive covenants, but not further or otherwise." In deciding the case the Court said that in its opinion the ordinary covenants on the assignment of a lease went no further than this—that is, no further than an indemnity to the assignor against any breach of covenant. Strangely enough, within less than a week after the decision in *In re Poole & Clarke's Contract* (*supra*), the very question as to the interpretation of the covenants of the assignee of a lease to perform the covenants of the lease came up for decision. Again there was no authority in point. Warrington, J., acting partly on the opinion expressed by the Lord Justices in *In re Poole & Clarke's Contract* (*supra*), decided that such covenants did not entitle the assignor to compel the assignee to fulfil the covenants in the lease, but merely to indemnify him against their breach. A further, and as it seems to us a better ground was this, that, as far as restrictive covenants in leases are concerned, the assignee's covenant to observe and perform them is not a negative covenant, and therefore one which the Court can enforce by injunction.

J. A. S.

There can be no doubt that the business risks of a banker have been considerably added to by the decision in *Capital and Counties Bank v. Gordon*, noted in this

Magazine for February last (Vol. XXIX, No. 331, p. 226), which deprives him of the safeguard of sect. 82 of the Bills of Exchange Act, and casts him upon the disabling austerities of the Common law, when he credits a customer with the amount of an uncleared cheque. And though no doubt some attractions would still remain to him in the pursuit of his profession, it would have been an uncompensated encroachment upon these if the claim had been successful in *Akrokerri Mines v. Economic Bank* (L. R. [1904], 2 K. B. 465; 73 L. J. R. [1904], 743), and he had been converted into a purchaser instead of a collecting agent, and had so lost the security of the section, by merely entering in his own ledger to the credit of a customer, to whom the entry was not communicated, the amount of such a cheque. He has been spared that threatened peril, but probably he would have incurred it if the entry had been made in the customer's pass-book.

As there is a difference between allowing a customer to draw against a cheque before it has been paid and allowing him to overdraw on the expectation of its payment, it is probable that in preserving the latter theory a banker would be sheltered by the section; though perhaps it might be prudent to charge interest for each specific overdraft. But, apart from the banker's benefit, it would perhaps be a commercial advantage if the Bill, brought in after the decision in *Capital and Counties Bank v. Gordon*, and dropped owing to the exigencies of Parliament, were re-introduced, protecting the banker, "notwithstanding that he credits his customer's account with the amount of a cheque before receiving payment." The instances where the title of a customer to a cheque is defective are small in number; while in a large number of cases it may be of commercial advantage to him to feel able to treat the whole amount which has been paid over the bank-counter to his credit as an undiminished fund upon which he may draw without negotiation.

Ruben and another v. Great Fingall Consolidated and another (L. R. [1904], 2 K. B. 712; 73 L. J. R., K. B. 872) has, as was conjectured in the last number of this Magazine (Vol. XXIX, No. 333, p. 484), been carried to the Court of Appeal; and that Court has reversed the decision of Kennedy, J., founded on *Shaw v. Port Philip Gold Mining Co.* ([1884], 13 Q. B. D. 103). The two principal points which determine a master's liability for wrongs done by his servant are, as stated in *Barwick v. English Joint Stock Bank* ([1869], 2 Ex. 259), where the act is done in the course of the service, and is for the master's benefit. So important did Lord Esher consider this latter point that, in *The British Mutual Banking Company v. The Charnwood Forest Railway Company* ([1887], 18 Q. B. D. 714), he said, "I know of no case where the employer has been held liable when his servant has made statements not for his employer's, but in his own, interest." But this principle does not seem to cover all the cases, and is not consistent with *Shaw v. Port Philip Gold Mining Company*. In this case, Mathew, J., said, "It is stated to have been the duty of the secretary to procure the execution of the certificate with the prescribed formalities, and to issue it to the person entitled thereto. It seems to me, therefore, that the secretary is held out by the company as their agent to warrant the genuineness of the certificate." And he added, that he did not consider that it made any difference whether a fraud was carried out by means of forgery or by other means. But these duties are common to all secretaries of joint stock companies, and so similar were the circumstances of this case to those with which Kennedy, J., had to deal, that he felt bound by it. As *Shaw v. Port Philip Gold Mining Company* has been a good deal commented upon, it was of some interest to see how it would be dealt with by the Lord Justice who, when in the Court below, took part in the decision; but his remarks upon the point

amounted to little more than that each particular case must be settled on its own facts.

The seal of a company to its own form of share certificate is the chief evidence of a holding when the shares numbered on the certificate are put upon the market; and if a company allows the seal to be under the independent control of an officer who is the appointed medium for delivering the sealed certificate to the persons entitled, it may be questioned, independently of this case, whether the company should not, under such circumstances, be responsible for their servant's dealing with the seal.

One of the excellent purposes of the first Judicature Act was, that the Court should grant all remedies to which the parties in every case before it were entitled, so that all matters in controversy should be finally determined and all multiplicity of legal proceedings avoided. But this is sometimes abridged by the requirements of other Acts. In *Bow v. Hart* (L. R. [1904], 2 K. B. 693; 73 L. J. R. [1904], K. B. 894), for instance, a County Court Judge held that he had no jurisdiction where, in answer to a claim for an injunction to restrain infringement of a trade mark, notice was given that the validity of the mark and the jurisdiction of the Court would be disputed, and that application would be made to the High Court to expunge the mark. Apparently the mark was held to be in the nature of a franchise, which by sect. 56 of the County Court Act would be excluded from decision by him. But a franchise is, in Blackstone's words, a royal privilege or branch of the Sovereign's prerogative subsisting in the hands of a subject; and this could scarcely apply to a trade mark, the creation of statute. The case went up to the Divisional Court which allowed the appeal, but the Lord Chief Justice felt that the question was so important that he was anxious that his decision in favour of the County Court jurisdiction should

be reviewed by the Court of Appeal. The matter will, therefore, probably go higher, and, if the decision of the Divisional Court should be upheld, the case will be remitted to the County Court. But if the title is to be contested, the dispute must, under the Patents, Designs and Trade Marks Act, travel again to the High Court; and the curious result is possible that one Court may decide to protect the existence of a thing which another Court may say does not exist.

T. J. B.

SCOTCH CASES.

The "Church Case," to which we referred when it was before the Court of Session (Vol. XXVII, p. 489), has now been reversed by the Supreme Appellate Court (*Free Church v. Lord Overtoun* [1st August 1904], 41 Sc. L. Rep. 742). To the vast majority of the Scottish people, apart altogether from religious creed, the result appears in the light of a great wrong committed in the name of the law. Whatever may be said of the law, the judgment of the House of Lords is glaringly inequitable, for let us see what it means. It means that a minority represented by 27 out of 670 members of the Free Church Assembly of 1900 are to have the whole church funds and buildings, variously estimated to be worth between seven and ten millions sterling, handed over to them to propagate the narrow Calvinistic doctrine of Predestination. It means that the well-appointed churches of the cities and large centres, now held by the United Free Church, are in future to be controlled by ministers and elders from remote highland parishes, who certainly could not be comfortable in the possession of organs or choirs, or cushioned pews or stained glass windows, all of which are, in their opinion, the direct inventions of Satan. It means that only one out

of every thirty-six of the churches will have a congregation of worshippers, for it is notorious that the huge money and property bribe which is now daily dangled before the erring majority has met with scant response. It means, finally, that the educational colleges of the church at home, and its whole missionary enterprise abroad are paralyzed, for they cannot be maintained without students and missionaries, and of these only an insignificant sprinkling belong to the victorious minority.

But, as a legal journal, we are not so much concerned with the momentous consequences of the judgment as with the law upon which it is founded. In our previous notice we summarized the leading grounds forming the basis of the unanimous decision of the Scottish judges. These grounds have been over-ruled, and it is sufficient to say that, for the time at least, they must be considered bad law. It would serve no purpose either to support or to criticise in detail the arguments by which the Lord Chancellor and the other lords of the majority based their judgment. That has already been done, almost *ad nauseam* by the lay press, and by every species of platform speaker. There is, however, one aspect of the case which we cannot altogether ignore. It is said that gifts should, as far as possible, be regulated by the donor's intention; but is it possible to believe that any considerable section of those who from 1843 onwards contributed money and property for the establishment and enlargement of the Free Church intended that they and their successors should be bound by the letter of a dogma, which, however it may have suited the age in which it was framed and the mental temperament of the framers, was, in many parts, utterly revolting to nine-tenths of those who, since the great disruption, built up the Free Church? Even if, to stretch a point, we take the Lord Chancellor's view, that the meaning of the "disruption" which gave rise to the fund is to be interpreted by chance press or platform

utterances of the leaders of the movement, we must also take into account that the progress of the fund and the increase of the property have been gradual; that twenty years after the utterances referred to not a tithe of the ultimate amount had been contributed, and that the great majority of the donors of the fund made their donations in profound ignorance of the particular arguments and illustrations which leaders long since dead addressed to followers of a preceding generation. The decision therefore is to be regretted, not only because it introduces into Scotland a state of chaos which only legislation can remedy, but because it strikes at the foundations of equity, and destroys, or at least seriously imperils, the long-established legal principle that in the interpretation of a gift the donor's intentions are of the first importance.

The codifying Acts affecting Commercial law which, in a less exigent period of parliamentary life, were with great effort placed upon the statute book, have had some influence, though not so great as it should have been, in assimilating the laws of England and Scotland. When, by this means, English law has been introduced into Scotland, questions of interpretation naturally arise in the latter country, and are sometimes very perplexing. Two instances may be cited from the Scottish decisions of the last quarter. One represents a phase of the law of auction sales under the Sale of Goods Act 1893, and the other a total subversion of the old Scottish rule regarding proof of liability under the Bills of Exchange Act 1882. The question regarding sales by auction was raised in *Fenwick v. Macdonald, Fraser & Company, Limited* ([1904], 41 Sc. L. Rep. 688), and turned upon the interpretation to be given to sect. 58 of the Sale of Goods Act. The printed advertisement of a sale of cattle by auction contained a condition that the exposor reserved power to make one offer for each animal, and a note

annexed stated that the herd in question was now offered "for unreserved sale." Now, before the Act, a "reserved bid," though common enough in England, was scarcely known in Scotland, the practice being to fix an upset price and to sell at any advance which might be offered. In this case the framers of the condition had evidently been inspired by English models, but in Scottish law a reservation of any kind is inconsistent with an "unreserved sale." After certain bids had been made, and the bidding had ceased, the sellers withdrew the herd from the sale on the ground that the amount of the reserved bid had not been reached. The highest public bidder now claimed to be the purchaser, and thereafter raised this action to vindicate his right. The Lord Ordinary repelled his claim, but upon a ground so doubtful in law that it need not now be discussed. The Inner House (Second Division) affirmed the judgment, but adopted a different and probably a sounder basis. It was held that by the express terms of the section under consideration neither expositor nor offerer was bound until "the fall of the hammer," and as admittedly the hammer had not fallen, it was open to either party to withdraw. In this respect the previous law of Scotland was altered by the Sale of Goods Act, for, as Lord Trayner pointed out, there can be little doubt that, prior to its date, "a subject exposed to sale by public auction, and for which a single bid had been made, could not be withdrawn from the sale, and the person who had made the offer was entitled to call upon the auctioneer to knock it down to him at the amount he had offered." This was held in *Cree v. Durie* ([1st December, 1810], F. C.), and the rule has since been held to be well established in the Common law of Scotland. The converse was equally well established, so as to prevent a bidder from resiling from his offer until the subject had been finally disposed of to a higher bidder. The Act does not in express terms release the seller, but it was held in

Fenwick's Case now under notice that, if a buyer can, under the statutory rule, retract his bid at any time before "the fall of the hammer," it necessarily follows that the exposor is equally entitled at any time before the fall of the hammer to withdraw or retract his offer to sell. The pursuer's claim to be the purchaser was therefore negatived on this ground.

The other case referred to above as illustrating the effect of a codifying statute in subverting the Common law of Scotland was *Viani & Company v. Gunn & Company* ([1904], 41 Sc. L. Rep. 822). It turned upon the effect of section 100 of the Bills of Exchange Act 1882, which changed the law of Scotland by introducing parole proof as in England, where formerly only the peculiarly Scottish proof by "writ or oath" was available. The section bears that "in any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence." The earlier Scottish cases under this section, such as *National Bank of Australasia v. Turnbull & Company* ([1891], 18 Ret. 629), and *Gibson's Trustees v. Galloway* ([1896], 23 Ret. 414), showed great reluctance on the part of the First Division of the Scottish High Court to apply the new principle, and after the latter case it was freely suggested in legal circles that this part of the Act was practically a dead letter. In the case of the *Bank of Australasia* the Lord President (Inglis) and Lord M'Laren gave it as their opinion that no averment is relevant which will cause the bill "to cease to exist as a document of debt altogether." In the same case Lord Adam dissented from the view thus expressed. "It is certainly very anomalous," he said, "and against all principle, so far as I can see, that the effect of the written contract on the face of a bill or of any other written contract

should be taken away by parole evidence, but I cannot get over the fact that the Act of Parliament seems to me to say so." Lord Adam's view was adopted by the Second Division in the subsequent case of *Dryborough & Company, Limited, v. Roy* ([1903], 5 F. 665). In the case of *Viani & Co.* now under notice, it was urged at the bar that the circumstances distinguished it from *Dryborough's Case*, and that, even assuming that case to have been rightly decided, it was going much further to hold parole proof competent in the present case. The Second Division, however, failed to see the distinction, and adhered to their former judgment. We trust that the law is now settled on these lines. The argument which prevailed in the older cases referred to seems fallacious. Every variation of a written agreement is a contradiction of it, at least in one or more of its terms, and the line cannot be drawn at such a contradiction as will entirely divest the written document of any effect. There can be no distinction between a total and a partial alteration of an agreement which will render parole proof in the one case relevant and in the other irrelevant. At least there is nothing in the 100th section of the Bills of Exchange Act upon which such a distinction can be founded.

R. B.

IRISH CASES:

The application in the case of *The Moorcock* (14 P. D. 64) of what is sometimes called the "doctrine of invitation" to the position of a wharfinger, virtually made him liable for damage to vessels using his wharf caused by defects in the berthage against which he might have warned them. It was thought to go somewhat beyond previous cases; and it is permissible to think that *Butler v. M'Alpine* ([1904], 2 Ir. R. 445) has gone a step beyond *The Moorcock*, on which it is professedly founded. In the present case, the

defendants were the lessees of a wharf in a tidal river. They hired a barge of the plaintiff to carry goods to this wharf at a place where the barge must necessarily ground at low water. The defendants had no control over the river bed. At some time, a block of hardened cement had fallen off the quay into the water; it was visible at low water, but there was no evidence that its existence was known to the defendants. The plaintiff's barge, while discharging alongside the wharf, grounded on this block as the tide fell, and was thereby damaged. In an action to recover for this damage against the defendants, both the King's Bench Division and the Court of Appeal held that the plaintiff could recover; but neither Court was unanimous, the Chief Justice dissenting in the Divisional Court, and Holmes, L.J., in the Court of Appeal. The principle thought to govern the case was stated by Gibson, J., thus:—"The owner of the wharf, whether by implied contract or implied duty, is under an obligation to the person whom he invites to discharge goods for him or for his profit at the wharf, to take reasonable care to ascertain and ensure that the berthage of the wharf is reasonably safe for a vessel invited to lie at the wharf." This was adopted and put in a little more pointed language by Fitzgibbon, L.J., in the Court of Appeal:—"They had invited the plaintiff's ship into a dangerous berth for good consideration; they had the means of seeing whether it was safe; the law implied an obligation on them to do so; and they are liable for not using reasonable care to ascertain whether there was danger, and if there was, to remove it or warn the plaintiff against it."

The majority in both Courts professed to adopt and apply the principle of *The Moorcock*. Now, though their decision may have been right, it does not seem that that case is altogether on all-fours with the present. In it the defendants had let to the plaintiffs the use of their wharf for discharging and loading cargo, at a place where a vessel

must necessarily ground at low tide. She was injured by the uneven nature of the ground, and it was admitted that the defendants had not taken any steps to ascertain whether or not the ground was reasonably safe for the vessel. Under these circumstances they were held liable, virtually upon an implied representation that the berthage was safe. It would seem that that was really a letting of a berth; and in the absence of any express undertaking it is not unreasonable to hold that letting a berth for a vessel implies a warranty that it is reasonably safe for that vessel's use. In the present case, however, there was no letting of a berth; the defendants hired the plaintiff's barge, and used the barge and the plaintiff's services at a place where there was a danger of which defendants and plaintiff were alike ignorant. There can therefore be no question of any warranty implied in a letting. The decision, if it is to be supported at all, must rest upon the broader principle which Sir F. Pollock calls the "duty of ensuring safety," incumbent upon the owner of fixed property in favour of persons coming on that property on the owner's business. But it does involve an extension of that principle from most previous cases. Usually, the danger for which the "invitor" has been held liable was something upon his own property, *e. g.*, *Indermaur v. Dames* (L. R., 2 C. P. 311). Here the danger was not on defendants' property, nor had they, so far as appears, any control over it or power of removing it. Is not the present decision, therefore, somewhat analogous to a case in which the "invitee" is injured by a concealed danger in the approach to the "invitor's" house, of which the "invitor" is ignorant? And it would seem to be a strong decision which would impose liability on the "invitor" in the case suggested.

Moore v. M'Glynn ([1904], 1 Ir. R. 334) illustrates the danger in a legatee's bringing an administration-action where the assets have been kept in the testator's business

by his direction. The claims of the creditors' and the executors' indemnity may crowd out everybody else, if the assets prove at all deficient. In the present case, the executor-defendant had been authorised both by the will and by the Court to carry on the business, at the expense of the entire assets, even after the primary decree for administration. The judgment on further consideration had declared the plaintiff (a legatee) entitled to his costs out of the funds in Court, and had also directed a sale of the business and an inquiry as to the trade debts remaining unpaid. A balance was found due to the executor, and also a considerable amount due to the trade creditors. An application was now made by the creditors for an order declaring them entitled to an indemnity out of the funds in Court, payable in priority to the plaintiff's costs, on the ground that they were subrogated to the executor's rights in this respect; and in this application they were held entitled to succeed. It is a neat working-out of a familiar principle. When an executor is authorised to continue trading, his expenses incurred in so doing are in the nature of a trustee's expenses necessarily incurred in the execution of his trust. For them he is therefore entitled to an indemnity out of the estate; and this indemnity takes priority, on allocation, even of costs, in an ordinary case. Moreover, when the continuance of trading has been specifically authorised, the trade-creditors are entitled by subrogation to the benefit of this indemnity, and to stand in the executor's shoes in respect of it; and, so far as this indemnity goes, therefore, they may also take priority over costs. For the proposition that the executor's indemnity ordinarily takes priority over costs of suit, *Morison v. Morison* (7 De G., M. & G. 214) is an authority; and for the creditors' right of subrogation, *In re Johnson* (15 Ch. D. 548). The only matter on which the plaintiff could rely in the present case was the form of the order on further

consideration, expressly awarding him his costs; but this had to be construed as subject to the ordinary course of allocation.

An interesting little case, though a fairly simple one, is *Morrison v. Belfast and Co. Down Ry. Co.*, (4 New Irish Jurist Rep. 295). It was indeed a somewhat audacious attempt to convict a railway company of an "undue preference," or in the alternative to impeach as unreasonable a condition which they attached to their subscription tickets. The applicant complained, in effect, that the Company had refused to issue a subscription ticket to him between two stations on their line for which such tickets were ordinarily issued. The Company justified their refusal on the ground of the applicant's having, while he was a subscription-ticket holder, persistently broken one of the conditions attached to the ticket. That condition, shortly, gave to holders of such tickets the same rights as to carrying luggage as ordinary passengers, but provided that "no subscriber shall be entitled to carry, free of charge, any merchandise or articles of any kind for hire or profit, or for the use of any person other than the subscriber." The applicant had, in fact, acted as a carrier in a small way between the two stations in question, making sometimes several journeys per day with merchandise which he had bought for customers on commission. The Company refused to renew his ticket, having reserved such power of refusal in their conditions. The Railway Commission for Ireland held, first, that there was no evidence of undue preference, and, second, that the condition as to merchandise was reasonable. Both points seem fairly obvious, having regard to the legal meaning of "luggage," as settled by many authorities.

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

War and Neutrality in the Far East. By T. J. LAWRENCE, M.A., LL.D. London: Macmillan & Co. 1904.

Mr. Lawrence is a well-known authority and writer on International law, and the present volume, which contains the substance of four lectures delivered at Cambridge, and of a paper read at the Royal United Service Institution, will be of interest to a much wider circle than mere lawyers, and should be read by all who wish for a clear understanding of the most important questions of International law, which have been, or appear likely to be raised, in the present war. After a short account of the quarrel, Mr. Lawrence considers and easily disposes of the charge of treachery made against the Japanese in their attack on Port Arthur on February 8th, and shows, that by recognised practice, it was justifiable without a previous declaration of war. He points out that the rescue by the neutral ships of war of the crew of the *Variag* in Chemulpo Harbour raised a question which had already baffled the Hague Conference, and which it is difficult to decide. He does not think the protest of the three captains was at all necessary, and speaks decidedly in opposition to Russia's threats against the use of wireless telegraphy by newspaper correspondents, and the sowing marine mines broadcast in the open seas—if that has taken place. A most suggestive part of the discussion is that given to the use of neutral waters, and contraband of war, including coals and foods. His observations on the interest of Great Britain in these points, the policy it is desirable for her to pursue, and her chances of success in it, are worth the closest consideration. We notice that Mr. Lawrence does not think that France has committed any violation of neutrality so far as she has supplied coal to the Russian ships. The whole book is written in a remarkably clear style, and in a reasonable and judicial spirit.

Encyclopædia of Forms and Precedents. Vol. IV, Commons to Companies; Vol. VI, Ferries to Insurance. London: BUTTERWORTH & Co. 1904.

There is a slight difference in the editing of these two volumes. They are both issued, as usual, under the general editorship of Mr.

Arthur Underhill, who is assisted in Vol. IV by Messrs. Charles O. Blagden, W. E. C. Baynes, A. F. Topham, and Vale Nicolas. In Vol. VI Mr. Underhill is assisted by the same gentlemen with the exception of Mr. Topham, whose place has been taken by Mr. Horace Freeman. The fourth volume is a little belated, as the fifth volume has already appeared, but its importance justifies the extra time taken in its preparation; as the greater part of it is taken up with the subject of Companies. For this subject, which takes up over 700 pages, Mr. A. H. Jessel and Mr. W. E. C. Baynes are responsible, as far as concerns Companies registered under the Companies Acts; while Mr. Edward Manson contributes the part which deals with Companies incorporated by Royal Charter or Special Act of Parliament, and also, as we have seen in the fifth volume, for the subject of Debenture and Debenture Stock. The subject is divided into some ten sub-sections, to each of which is given a preliminary note and a varying number of precedents, but amounting in all to over 500. Both notes and forms are clear and well drawn, and we notice that Mr. Chadwyck Healy's book on Company Law and Practice has been drawn on considerably, as the Editors gratefully acknowledge. The only form of winding-up that comes within the scope of the work appears to be Voluntary Winding-up. The rest of this volume is concerned with Commons. The sixth volume deals with a much greater variety of subjects, though none of them of the same importance as Companies, but many of them for that very reason are likely to prove the more acceptable to conveyancers, as they are all the more difficult to find in standard works. Some of these are written by well-known authorities on that branch of law, such as Friendly Societies, by E. W. Brabrook; Guarantees, by H. A. de Cölyar; Guardians of the Poor, by J. Brooke Little; and Insurance, by J. B. Porter. Other sets of precedents which we have noticed are Ferries, by G. T. G. Pease and H. Stuart Moore, and Harbours, by the latter, who is a recognised authority on the subject. Other subjects dealt with are Gardens and Squares, Gifts, Goodwill, Highways in Rural Districts, and some others; all of which seem suitable and useful.

Land Registration. By A. R. JENNINGS, LL.B., and G. M. KINDERSLEY. London: Stevens & Sons. 1904.

Opinions differ much as to the value of a system of land registration, and as to the results, so far, of the system established under

the Land Transfer Acts 1875 and 1897, but all will admit that practitioners require a handy guide to it. We think this work will meet the requirements of every-day practice, for which it is intended. It has not been the aim of the Authors to discuss complex and doubtful points of law, but they have expounded clearly and shortly the principle of Land Registration, given some useful notes on practice, and then set out the full text of the two Land Transfer Acts; the Land Transfer Rules 1903 and Forms; the Fee Order 1903 and Rules, and the Table of Fees. Last, but by no means least, comes a full Index of over 50 pages. The paper and print are excellent.

Work and Labour. By R. M. MINTON-SENHOUSE. London: Sweet & Maxwell. 1904.

This is not, as might be imagined, a treatise on the old count of "Work and Labour," but as explained in the sub-title, "a Compendium of the law affecting the conditions under which the manual work of the working classes is performed in England." The Author's real object has been to redeem and present in a useful form "large domains of this kind of law hidden away in but little known Statutes, and in esoteric Orders and Regulations of various kinds." The Author, as he confesses, must have found great difficulties in deciding when to draw the line, and he has on the whole done well in deciding "to err on the side of inclusion rather than incompleteness." He explains in an interesting preface his reasons for excluding the law relating to Compensation for Personal Injuries; Common Carriers; Housing of the Working Classes, and some other subjects. The course of his researches has led him to form a strong opinion of the desirability of the codification of the multitude of Statutes governing various branches of our law. For instance, there are thirteen Statutes relating to the slaughtering of animals, ten regulating inland fishing; and sixteen for the running of cabs and omnibuses. The work is contained in thirteen chapters, each of which has had the advantage of being revised or perused by an authority on that particular subject. The first chapter deals with the Employers and Workmen Act 1875. The second is headed "Trade Unions," and is a summary of the Trade Union Act 1871, and the Conspiracy and Protection of Property Act 1875, and the Trade Union Act Amendment Act 1876. As might be expected, it contains several references to *Allen v. Flood* and *Quinn v. Leatham*.

Chapter three is devoted to the Truck Acts. The fourth chapter is headed "Sunday," and although not of very great practical use now is worth reading from the quaint phraseology of some of the Statutes. The chapter on Factories and Workshops does its best to make plain a difficult and complicated subject, although we have not after a perusal of it been able to grasp clearly what may be a "domestic factory or workshop." The next chapter deals with Mines, Quarries, and Stannaries. The seventh chapter, on Seamen and Pilots, is of course based on the Merchant Shipping Act 1894. The chapter on Fishery treats on Sea Fishing—Shell Fish—Salmon and Freshwater Fishing. Chapter nine has the pith of no less than sixteen Statutes ranging from the London Hackney Carriage Act 1831 to the Motor Car Act 1903, and deals with a very confused mass of legislation. A chapter that contains a good deal of information not usually met with is that on the Army, Navy, Coastguard and Police. The last three chapters, which refer to a large number of miscellaneous occupations, are perhaps likely to be the most useful in the book, as they contain information which is more difficult to find than much of that given in the preceding chapters. These deal with all sorts of subjects, including, Pedlars and Hawkers; Slaughterers; Hop Pickers; Organ Grinders; Midwives; Game-keepers and Shoc-blacks. The work is not intended to be exhaustive on any of the subjects it contains, but it gives a great deal of valuable information, in many cases on little known subjects, and as far as we have been able to test it, its accuracy is great.

The Critic Black Book, 1903-4. Vol. I. Edited by HENRY HESS. London: The British and Colonial Publication Company.

This is the second annual issue of this publication, the aim of which, according to the Editor, is "to educate the shareholder, as well as the judges who are called upon to adjudicate upon the standing of directors." We are not quite sure what that means, or when judges have "to adjudicate upon the standing of directors." However that may be, the book must from its nature be of great service to those engaged in Company litigation, and is well worth the perusal of the ordinary investor. He would often save the price of it many times over if the reference to it deterred him from intrusting his interest to the care of gentlemen who, however high their position or extensive their experience, have been so very unfortunate in their undertakings. The edition for 1905 will have to be very much

enlarged if it is to contain, as promised, "the complete records of each director then holding office." To show the amount of labour bestowed on, and information contained in the volume, we may add that it contains over 2,250 pages and deals with something like 1,300 names. The list of companies connected with some of these names sometimes covers four or five pages. The longest we have noticed just extends into the sixth page.

Death Duties. By LOT BRAMLEY. London: Jordan & Sons.

The scope of this little book is fully described in the sub-title as "the apportionment of the duties as between trustees and legatees, annuitants, and other beneficiaries; and the position of purchasers of property with reference to death duties payable thereon." These "notes," for so Mr. Bramley calls them, originally appeared as articles in *The Law Times*, and are now published in an extended and revised form. They deal with questions that arise every day, and on which "little or no official assistance is obtainable," in a thoroughly clear and practical manner. Many of the questions that arise on these points are very debatable; for instance: whether personal property, over which a general power of appointment has been exercised by will, "passes to the executor as such." Mr. Bramley cites three cases negating and three affirming this proposition, so that the weight of authority seems fairly balanced: *Kekewich and Byrne, JJ.*, being opposed to *Buckley and Swinfen Eady, JJ.*

How to deal with your Taxes. By "An Expert in Tax Law." London: Grant Richards, 1904.

Modesty is not the strong point of the writer of this work, nor respect for the legal profession, as a few extracts from the preface will show. "Legal terminology has been abandoned as hopeless: the provisions of the Acts are explained in more or less comprehensive English." Perhaps he means *comprehensible*. "Nine hundred and ninety-nine persons out of every thousand will find herein all the information they require." "An attempt has been made to treat the subject with the accuracy of the legal expert, but without his characteristic heaviness." Still there is a good deal of useful information to be found in the book on the subjects of income tax, land tax, and inhabited house duty; and good advice in a

jocular form; but although "the characteristic heaviness" of the legal expert may not be found there, we do not always find his—we hope equally characteristic—"accuracy." For instance, we find in paragraph 116, speaking of Assessments and Appeals, "the annual values charged with Income Tax stand for five years. Once determined they cannot, within that time, be raised, except when structural alterations and additions have been made to the property." Now, it is true that in the Metropolis the valuations are quinquennial, but in the country, though in practice made every five years, they might be made annually. The values *can* therefore be raised any year in the country, and also in the Metropolis for some other reasons than the making of structural alterations and additions.

The Law and Practice of Bankruptcy. By HENRY WACE.
London: Sweet & Maxwell. 1904.

Those interested in Bankruptcy law have now an ample choice of new editions of standard works which they may consult. Mr. Wace brought out his work early in May: and new editions of Williams and Baldwin have recently appeared. The present book is not called the fourth edition of *Yate Lee and Wace on Bankruptcy*, though it is founded on that work, the last edition of which appeared so long ago as 1887. The accumulation of fresh cases since then necessitated the practical rewriting of the whole, which accounts for its present title. The form of this treatise is an annotated edition of the two Bankruptcy Acts 1883 and 1890, the Bankruptcy Appeals (County Courts) Act 1884, the Preferential Payments in Bankruptcy Act 1888, and the rules and forms. This fills about 630 pages; the Index takes about 100 more, and the Table of Cases over 80. The notes are very full and exhaustive. Those, for instance, on sect. 4 of the Act of 1883 take up nearly 50 pages, and those on sect. 44 about 60 pages. It would have made the effect of sect. 163 of the Act of 1883 and sect. 26 of the Act of 1890 clearer if the sections of the Debtors Act 1869, which they amend, had been given in full or summarised.

The Law and Practice relating to Letters Patent for Inventions.
By VALE NICOLAS. London: Butterworth & Co. 1904.

Handy Guide to Patent Law and Practice. By GEORGE FREDERICK EMERY. London: Effingham Wilson. 1904.

Mr. Vale Nicholas wished to treat the law and practice of Letters Patent as concisely as possible. In this we think he has succeeded without rendering his work either dry or difficult to follow. Two of the ways he has adopted to carry out his purpose are the omitting all references "to matters and cases which are of historical value only;" and the absence of reference to the decisions as to grants of compulsory licences under section 22 of the Act of 1883. The reason for the last omission is that by the Act of 1902, section 22 of the Act of 1883 is repealed, and the power of granting such licences transferred from the Board of Trade to the Judicial Committee of the Privy Council. We do not think his scheme of arrangement is quite a logical one. After a description of the subject-matter of letters patent the Author goes on to deal with the application for the grant, and the chapter on specifications seems to us rather out of place as it comes after "the grant," and not, as we should have thought most natural, before it. The next chapter treats on the devolution, etc., of patents; and the next on attacks on the patent, and proceedings by members of the public for unwarranted threats on the part of the patentee. We think, perhaps, then should have come the chapter on infringements, but one on extension of term of grant is interposed, and after the one on infringement comes one on appeals, to the law officers; which would, we think, have come more naturally in the early part of the book, which discusses the necessary steps to obtain a patent. But whatever may be the best way of arranging the chapters, the information given in them is clearly and accurately conveyed and the whole subject is well covered. To show the care with which the whole question has been considered, we may quote a few of the doubtful points to which Mr. Nicolas draws attention. One is whether the use of an invention in a colony not empowered to grant patents for inventions "would invalidate subsequent letters patent for the same invention taken out at home." Another is whether a beneficed clergyman can become a patentee. It also does not seem to be clear whether a foreign inventor may himself come over to this country and "communicate" his invention.

We like the arrangement of Mr. Emery's book better, and think it is a very useful "guide to patent law and practice." We should like particularly to call attention to one subject to which the Author himself refers in the preface, and that is the alteration of the law as to compulsory licences. This is dealt with fully in the body of the work, and the reason of the enactment is given as follows: "There is little doubt that the main reason for the enactment was to prevent a British patent from being used simply to prevent the growth of a new industry in this country, by what may be termed the dog-in-the-manger policy adopted by many foreign patentees, and the words of the section, if followed to their logical conclusion, seem very apt for effectuating that object." Mr. Emery goes on further to express the pious wish—"It is to be hoped that the Judicial Committee will put a liberal interpretation on sub-sect. 6, and regard the reasonable requirements of the public as satisfied only by such working in the United Kingdom as will put the home producer on an equality with his foreign rivals, both in the home markets and in the markets of the world." Mr. Emery is as a rule remarkably clear in his style, but we have come across at least one sentence we cannot understand—"The meaning of 'First and true inventor' is conpresentatives, and so be not lost to his estate." We think there must be a misprint somewhere. Appendix B contains some useful Conveyancing Forms.

The Law of Banking. By HEBER HART, LL.D. London: Stevens & Sons. 1904.

Mr. Hart displays in this work great industry and great knowledge of his subject. The object he has aimed at is no small one; it is no less than to include in his work "all that can fairly be considered to have a special bearing upon bankers and their business." It is no wonder, then, that this volume is of considerable size. The text contains nearly 850 pages, and the index another 100. There are eight parts: the first deals fully with Banks and Bankers, gives their constitution, relation to officers and staff, branches, etc., and a description of the constitution and foundation of the Bank of England; Part II is the "Account"; Part III, "Customers' Cheques"; Part IV, "Acceptances"; Part V, "Collection"; Part VI, "Bankers' Documents of Credit"; Part VII is a short one dealing with "Incidental Services"; but, to make up for that, Part VIII is

the longest of all and is entitled "Advances." It deals with a variety of subjects connected with the lending business of a bank, such as guarantees, lien, mortgages; and covers over 250 pages. Every subject is treated of clearly and thoroughly, and the cases are cited and discussed in a very satisfactory manner. We can only call attention to a few points. Mr. Hart very properly points out the very uncertain state of the law with regard to the legal effect of entries in pass-books, and sums up the English law by a quotation, curiously enough, from an American treatise. "Mistakes may be corrected by either party, subject to the rule that each party must bear any loss resulting to the other by reason of acting on the faith of an entry made by him or his negligent acquiescence . . . Silence may estop the depositor as to charges actually made in account stated to him, but cannot give authority for future similar charges." It is interesting to compare with this the passage quoted on the same page, and from the same work, which seems to represent the balance of authority in the United States. Mr. Hart's opinion of the banker's responsibility for the safe custody of the customers' property is worth noticing. He considers that he is bound to take reasonable care, which is "such care as an ordinary efficient and prudent banker would take in similar circumstances." He does not accept the view that a banker is a gratuitous bailee, and only liable for gross negligence, and cites comments from *Beven on Negligence*, *Smith's Leading Cases*, and *Byles on Bills* on the case of *Giblin v. McMullen*. But Mr. Hart goes further, and contends that even if his view of the law is wrong and a banker is a gratuitous bailee, that it would make no practical difference, as "that in a banker would be gross negligence which would not be so in others." There are a few points which we think might have been treated more fully, such as the effect, if any, of crossing a cheque *a/c payee*; the best course for a banker to pursue when a garnishee order is served on him: and we do not find any information on the question whether a receipt acknowledging receipt of money for a fixed period is liable to stamp duty, or any reference to the cases of *Thomson v. Bell* and *Horne v. Redfearn*.

The Expansion of the Common Law. By Sir FREDERICK POLLOCK, Bart., D.C.L. London: Stevens & Sons. 1904.

We think Sir Frederick Pollock has done well in publishing the lectures he delivered in 1903 to the Law Schools of various American

Universities. No one can read his account of the growth and development of the Common law without interest and profit. Many points of interest are connected with this main subject, such as the rise and development of the Chancellor's Equity jurisdiction, the origin and shaping of our criminal procedure, and the history of trial by jury. All of these are discussed with the Author's well-known learning, and set out in his polished diction. Many happy touches of graceful humour enliven and illuminate the discourse. Take his description of the effect of Tudor legislation. "It is no fault of theirs (our mediæval ancestors) that the arbitrary legislation of the Tudor period plunged us into a turbid ocean vexed by battles of worse than fabulous monsters, in whose depths the gleams of a *scintilla juris* may throw a darkling light on the gambols of executory limitations, a brood of coiling, slippery creatures abhorred of the pure Common law, or on the death struggle of a legal estate sucked dry in the octopus-like arms of a resulting use; while on the surface, peradventure, a shoal of equitable remainders may be seen skimming the waves in flight from that insatiable enemy of their kind—an outstanding term." He makes a delicate allusion to the lawless conditions of some parts of the United States when, in referring to the old office of sheriff, he says, "he still performs his duties in person in America, though not in England except for ceremonial purposes; and I understand that in some American jurisdictions, where unsettled conditions have produced a certain reversion to the simplicity of our ancestors, the performance may still require a good deal of courage and activity." A remarkable suggestion is, that in matters of great weight and general importance to the Common law, the English and American "ultimate authorities" should assist each other. This he proceeds to develop into a proposition that the House of Lords or Privy Council should be able to desire the judges of the Supreme Court of the United States to communicate their collective or individual opinions on any question of General law. We doubt the feasibility of any such scheme, and think that the learned Author may have forgotten for the moment when he made this suggestion, that in the consultation of the English Judges by the House of Lords which he uses by way of illustration, the Judges only deliver their opinions after hearing the case argued.

Bills of Exchange, Cheques, and Promissory Notes. By ALLAN McNEIL. Edinburgh: Wm. Green & Son. 1904. Mr. McNeil

has prepared this outline of the law relating to these documents for the use of students preparing for the Associate's examination for the Institute of Bankers in Scotland. It seems very well adapted for that purpose. It does not perplex the mind of the student by reference to cases; the only references given are to the Bills of Exchange Act 1882. It is curious to notice some differences between the law of Scotland and that of England. For instance, in Scotland, both bills and cheques operate as an *intimated assignment*, and bind funds in the hands of the drawer or banker available for the payment thereof. A very curious law in Scotland is, that a cheque drawn for less than twenty shillings is not void, but any person who issues or negotiates it is liable to a penalty of not less than £5 nor more than £20.

The Licensing Act 1904. By WILLIAM W. MACKENZIE, M.A. London: Butterworth & Co. 1904. Mr. Mackenzie is a well-known authority on licensing law, and he issues this annotated edition of the Act of 1904 to show how far the existing law has been altered by the new Act. It contains an Introduction in which Mr. Mackenzie points out that the great change made by the new Act is, "that it restricts the power of licensing justices to refuse to renew an existing licence to four grounds, which he gives, "while in all other cases the licensing justices can only report the question of refusing to renew to Quarter Sessions, and Quarter Sessions cannot refuse to renew except on payment of compensation."

Second Edition. *Mozley and Whiteley's Law Dictionary.* By LEONARD H. WEST, LL.D., and F. G. NEAVE, LL.D. London: Butterworth & Co. Toronto: The Canada Law Book Company. 1904.

There is no lack of large Law Dictionaries; but we do not know of any other small one. It will answer the purposes of many who, on grounds of expense or some other good reason, do not care to embark in the purchase of Wharton or Stroud. We are surprised to find so much information in so small a space. Of course it is not, neither is it intended to be exhaustive, but on looking through it we have noticed but few omissions. We think our old friend, "the hypothetical tenant," might have been included; and that under "abeyance," should have been an account of a peerage in abeyance.

Under "challenge" it is not mentioned that in some cases of treason the defendant is entitled to thirty-five peremptory challenges. There is rather a useless cross reference under this head; at the end of the heading Challenge, we find "See Favour, 'Challenge to," but on referring to "Favour, Challenge to," all we find is "[Challenge]." We notice also that in the description of "tales" no mention is made of the necessity of the warrant of the Attorney-General.

Second Edition. *A Practical Guide for Sanitary Inspectors.* By F. C. STOCKMAN. London: Butterworth & Co. 1904. This strikes one as very well adapted for its purpose, which is to instruct both Sanitary Inspectors, and Students preparing for such appointments, in their important and multifarious duties. It also contains much on such subjects as building, drainage, infectious diseases, etc., which is calculated to be useful to every householder, and may sometimes be of assistance to a professional man.

Second Edition. *A Concise Treatise on the Law of Covenants.* By G. BALDWIN HAMILTON. London: Stevens & Sons. 1904.

As Mr. Hamilton first issued his work in 1888 it is evident that there were very many cases to be added, and much revision necessary. Considerable care seems to have been bestowed on this task, and the result is a very useful book, giving in short compass the principles of law applicable to various classes of cases, and the decisions which support and illustrate them. We should have welcomed more discussion and even criticism on some subjects, such as the very difficult question of the liability of a lessee who has covenanted to pay rates and taxes, etc. Mr. Hamilton seems to us to hardly emphasise enough the extension of tenants' liability which the cases since 1897 have given the foundation for. We notice he does not cite *Antil v. Goodwin*. Another omission we have noticed is, that in dealing with covenants to build, repair, etc., no reference is made to the case of *Jacob v. Down*. An addition which we think might be made is a notice of the cases on mining covenants.

Third Edition. *Reminders for Conveyancers.* By HERBERT M. BROUGHTON. London: Horace Cox. 1903. A very useful little book for conveyancers, suggesting a large number of points for their consideration, and referring to cases or books which will help them to decisions.

Third Edition. *The Law relating to Motor Cars.* By H. LANGFORD LEWIS and W. HALDANE PORTER. London: Butterworth & Co. 1904. This little book has already reached a third edition; a satisfactory testimonial to its well supplying a want. It contains a short Introduction; the Motor Car Acts 1896 and 1903; the Regulations of the Local Government Board, and the Petroleum Regulations 1903. The Acts are provided with full notes, and the whole makes a very desirable possession, both for the owners and drivers of motor cars, and for those who may have to prosecute or defend such owners or drivers.

Fourth Edition. *The Laws of Insurance.* By JAMES BIGGS PORTER. Assisted by W. FIELDEN CRAIGES, M.A. London: Stevens & Haynes. 1904.

This is the only English work we know of that contains the law of all Insurances except Marine; that is, it covers Fire, Life, Accident, and Guarantee. It is also remarkable for the large number of decisions, other than English, it contains; in fact Mr. Porter has found it necessary, or at least advisable, to assist his readers by giving a list of the abbreviations by which American and Colonial reports are referred to. As this book has been some twenty years before the public, and now reaches its fourth edition, it may be considered as well established in the public favour, and we think it deserves its reputation. It is clear and, as far as we have been able to test it, accurate. If it has a fault, it is one which it is rather dangerous to allude to, namely of sometimes erring on the side of conciseness, as some subjects and cases we think might with advantage have been treated at greater length; but still one object, no doubt, of the Author, was to produce a handy volume; and to have done this, and cover all the ground he does, and refer to nearly 1,800 cases, is no small achievement. As probably a comparatively new development of Insurance law, we think the part dealing with Accidents one of the most interesting. One subject that we think is omitted is Insurance against Burglary.

Fourth Edition. *Illustrations in Advocacy.* By RICHARD HARRIS, K.C. London: Stevens & Haynes. 1904.

This is a supplemental work to Mr. Harris's well-known *Hints on Advocacy*. It is largely devoted to pointing out blunders, and as all the cases are real ones it well repays study. Mr. Harris is rather severe on some "eminent counsel," and perhaps hardly gives solicitors sufficient credit for intelligence; but he is undoubtedly right in emphasising again and again the necessity of cross-examining on a scientific, thought-out plan, and having the courage to disregard "instructions" when they do not fit in with that plan. As a leading example of how things should be done, he gives a careful analysis of Mr. Hawkins' speeches for the prosecution in the *Tichborne Case*, and of part of his cross-examination of Old Bogle and Baigent. Another interesting analysis is that of Cicero's defence of Roscius.

Fourth Edition. *Wheaton's International Law.* By J. BERESFORD ATLAY, M.A. London: Stevens & Sons. 1904.

Wheaton's is perhaps the best-known book on International law in the English language, and the last English edition was published in 1889. Points of International law have arisen frequently since then. There have been numerous and important treaties concluded; there have been the American and Spanish and English and Boer wars; and a war, the results of which must have world-wide effects, is at present raging. We naturally turn, then, to this edition of Wheaton to see what is said as to the points which have most recently engaged our attention. We do not find very much about the Russo-Japanese war, owing to its having only just begun when the present work was under revision; but there are some allusions to the questions of declaration of war, Russian declaration of food being contraband, and denunciation of wireless telegraphy. We do not find as much as we expected about the South African war. We have found no notes on the controversies as to the use of the white flag, as to suzerainty, and the sending of our forces through Portuguese territory. The only allusion we have noticed is to the dispute with Germany with reference to the seizures of *The Bundesrath* and *The Herzog*. We have not come across any reference to the decision of the Alaska Boundary Commission last year, which excited so much comment and irritation in Canada. We do, indeed, find in the Index, "Alaska, settlement of boundary dispute," but that appears to refer

only to the award of the Emperor of Germany in 1872. We think that the Index might be considerably improved, as, for instance, we were not able to find any reference either to South Africa, Anglo-Boer War, *Bundesrath*, or *Herzog*, to enable us to examine what was said on these subjects. Turning from the unpleasant duty of pointing out what we were not able to find, we are glad to call attention to the text of the Anglo-French Agreement which, though too late to be included in the text, will be found in Appendix K. In Appendix C will be found the Proclamation under the Foreign Enlistment Act made on the outbreak of the Russo-Japanese war. It will be of interest to note the Editor's treatment of the question of contraband of war, wherein he properly calls attention to the attitude of Russia on the question of food, and points out that the English law is that the status of provisions and many other articles depends upon whether, under the circumstances, they were intended to be applied to warlike purposes. We find an unqualified condemnation of the right of captors to destroy neutral prizes, and a firm assertion of the right of neutrals to obtain reparation for the unjust sentences of foreign Prize Courts. There is an interesting note on the question of loans to belligerents by neutrals, but the two cases cited, one English and one American, do not help us very much to decide the question, as they were not cases of one nation trying to raise money in a neutral country to carry on war against a third nation; but they were cases where insurgents tried to raise a loan to help them to carry on war against the State to which they were or had been subject.

Fifth Edition. *Hanson's Death Duties.* By L. J. DIBDIN, D.C.L., and F. H. L. ERRINGTON. London: Stevens & Haynes. 1904.

We doubt if there is any branch of law as difficult and complicated as that of the Death Duties; and as the public have to contend, in cases of dispute, with all the subtilty of mind and regardlessness of cost of the law officers of the Crown, any lawyer advocating his clients' interests requires to be very well prepared. We can say without hesitation that practitioners will find the present edition of *Hanson's Death Duties* a great assistance. There is a very good and clear introduction of nearly eighty pages, provided with very full references to the sections of the Acts, and to the pages where these are to be found. Then we find the first twenty-four sections of the Finance Act 1894 annotated with

great care and completeness; then the same sections without notes. After this are given the sections concerning death duties of the Finance Acts 1896, 1898, and 1900, and of the Revenue Act 1903. These are not annotated, but the sections are referred to when necessary under the principal Act. The next part deals with Legacy Duty, and is composed of the Legacy Duty Act 1796 and the Schedule Part III to the Stamp Act 1815, both annotated. The body of the book then concludes with the annotated Succession Duty Act 1853. There are two Appendices and a good Index. It is interesting to notice the points in which the learned Authors do not agree with the contentions of the Inland Revenue. One such is connected with Advowsons, on which the authors do not think duty is payable unless sold by the direction of the deceased or in the administration of his estate. "The Revenue, however, take the contrary view, and the point awaits judicial decision."

Sixth Edition. *Stephen's Digest of the Law of Evidence.* By Sir HERBERT STEPHEN, Bart., and HARRY STEPHEN. London: Macmillan & Co. 1904.

No important statute affecting the general law of Evidence has been passed since the Criminal Evidence Act 1898, but there are always new cases enough to justify a new edition every five or six years, and besides, it is not improbable that the last edition of a book in such constant demand as this is may have been sold out. Among the notes added since Sir James Fitz-James Stephen's death, and which well deserve attention, are those on the inconsistency of *R. v. Wealand* and *R. v. Paul*, and that on *R. v. Lillyman*.

Seventh Edition. *The Law of Torts.* By SIR FREDERICK POLLOCK, Bart., D.C.L. London: Stevens and Sons. 1904.

Cases illustrative of the Law of Tort. By COURTNEY S. KENNY, LL.D. Cambridge: The University Press. 1904.

Cases illustrating the principles of the Law of Torts. By FRANCIS R. Y. RADCLIFFE, K.C., and J. C. MILES. Oxford: Clarendon Press. 1904.

Sir Frederick Pollock's well-known work appears regularly at intervals of three or four years, and its reputation is so well established,

that the only thing that remains for a reviewer to do is to see what additions have been made since the last edition. In that edition the chief alterations were due "to what was decided, perhaps still more to what was suggested" in the case of *Allen v. Flood*. Now in this one the only material alterations have been caused by the Editor's attempt to compare the decisions in *Quinn v. Leatham* and the cases in the Court of Appeal, such as *Read v. Friendly Society of Operative Stonemasons*, *Glamorgan Coal Company v. South Wales Miners' Federation*, and *Giblan v. National Labourers' Union*, with *Allen v. Flood*, and to sum up the results. This has been a work of great difficulty, but we should recommend all our readers to peruse very carefully Part IV of Chapter VIII. We might specially call attention to the criticisms on the references to Conspiracy and Malice, and we may quote the following submission. "It is submitted that the decisions would be materially simplified if it were understood that all damage wilfully done to one's neighbour is actionable unless it can be justified or excused. Conspiracy would then appear as matter of aggravation, or as enabling persons acting together to inflict damage which merely individual action could not have inflicted; and instead of asking whether malice was part of a cause of action, we should ask in what cases good intentions, or reasonable and probable cause, are a justification or a step towards justification." We might also refer to the suggested solution of the very difficult question of how far it is actionable to induce acts not in themselves unlawful but injurious to a third party. The interesting comparison of the English and American doctrines as to the liability of a Telegraph Company for incorrectly transmitting a message may one day be of practical value, if ever the case of a foreign telegram goes up to the House of Lords.

Mr. Kenny's selection of cases seems to us most appropriate for coupling with Sir Frederick Pollock's treatise, as Mr. Kenny has borne in mind, "in arranging the sequence of topics" in his book, that most of those who use it would do so in connection with that of Sir Frederick Pollock, and has also made numerous references to it. The collection is designed for the use of the university student who has not ready access to law books, and contains two hundred cases, selected not only from decisions in England but also America and India. The selection is a very good one, and the reports are judiciously abridged where necessary, as in *Allen v. Flood*, which is cut down to seven pages. To many of the cases there is a note

appended, in most cases very short, but very much to the purpose. For instance, the reader is warned against pressing the decision in *Allen v. Flood* "to any wider scope than that of its own circumstances." The note to *Quinn v. Leathem* suggests to the student the invaluable (though difficult) exercise "to contrast the two foregoing (*Allen v. Flood* and *Quinn v. Leathem*) decisions of the House of Lords, which at first sight may appear to him to be in conflict, and to endeavour to determine their mutual bearings. An interesting case, and one perhaps not generally known, is the American one of *Robinson v. The Rochester Folding Box Co.*, where a lady strove in vain for redress against the defendants for having printed and circulated 25,000 likenesses of her without her knowledge and consent. The Court of Appeals, however, held that the "Rights of Privacy" had not as yet found an abiding place in American jurisprudence, though three members of the Court dissented from the majority. Mr. Kenny, no doubt rightly, considers that the same view would probably be taken in England, though he evidently sympathises with the sufferers from "the annoyance now caused by the increasing zeal of the cheaper newspapers and of Kodak photographers." In a part of the same note he gives an interesting instance how the different conditions of domestic life in India have permitted the acquisition of a still greater Right of Privacy. A very curious American case is referred to in the note to *Mayor of Bradford v. Pickles*, namely, the *Suffolk Bank Case*, where one bank was sued by another for habitually presenting for immediate payment any notes of the latter bank that came into its hands. There is a valuable note to *Merivale v. Carson*, in which, after discussing at some length the meaning of the word "fair" as applied to critical comment, the Author refers to the unsettled question "as to whether a comment, which is in itself quite fair, can be rendered actionable by the spitefulness of the writer's motive." On the whole, he seems to think that it would not. The cases given range in point of date from *Adam's Case*, which was decided in 1293, to *Colls v. Home and Colonial Stores*, which was decided in the present year.

Messrs. Radcliffe and Miles have made a very good selection of cases, ranging from the subject of "Assault" to "Torts committed without the Jurisdiction," and it is very well adapted to illustrate and impress the leading principles of the Law of Torts on students. A great deal of care and labour has evidently been disposed in the editing of these cases, as the head-notes have been specially written,

and as a rule only one judgment or part of a judgment is given. For instance, in *Allen v. Flood*, only Lord Watson's judgment is selected, and in *Derry v. Peek* only part of Lord Herschell's, and in *Dalton v. Angus*, Lord Blackburn's. This, however, is not always the case, as in *Quinn v. Leatham* we find the judgments of both Lords Macnaghten and Lindley. The notes are not numerous, and are mostly either to lay down what the editors believe to be the correct law to be extracted from conflicting cases, as in *Davison v. Gent*; to give short summaries of law; or to comment either on a case or on other criticisms of it, as in *Asher v. Whitlock*, where the Editors decline to accept without limitations the general propositions of the law of ejectment which that case seems to enunciate. There is a very useful little note pointing out the differences between actions for false imprisonment and malicious prosecution. We think it would have been well to add a note to *Stanley v. Powell* referring to Mr. Beven's criticism of the judgment. The value of this book as a work of reference is somewhat diminished by its having neither an index nor a table of cases cited.

Tenth Edition. *Harris's Principles of the Criminal Law.* By CHARLES L. ATTENBOROUGH. London: Stevens & Haynes. 1904.

Sixth Edition. *Stephen's Digest of the Criminal Law.* By Sir HERBERT STEPHEN, Bart., and HARRY LUSHINGTON STEPHEN. London: Macmillan & Co. 1904.

We are glad to see new editions of these two excellent works, different as is their scope. There is nothing very new in either; as there have not been of late either many important statutes, or cases dealing with the Criminal law. The last edition of *Stephen's Digest* was published so long ago as 1894, but probably the only two statutes of much importance dealing in any way with criminal questions passed since then, are the Companies Act 1900 and the Licensing Act 1901. Both books have been noted up with care, but there are in each a few cases missing which we think it would have been well to refer to. For instance, Mr. Attenborough cites *R. v. Brannon* as an authority without mentioning the case of *R. v. Blackson*, a case of greater authority which differs from it, and which last case was followed by Darling, J., in the very recent case of

R. v. Tiffin. There is no reference in the *Digest* to either *R. v. O'Shay* or *R. v. Tibbits*, and in neither volume is there any allusion to the ruling of the Lord Chief Justice in *R. v. Krause*. Neither is there any reference to the decision of Buckley, J., in the *Globe Company Case*. For the rest we have nothing but praise for these works. Mr. Attenborough's book is clear, comprehensive and accurate, and contains a very useful Table of Offences, their punishments, Statutes, &c.

Stephen's Digest is the nearest approach to a Criminal Code we possess, or are likely to possess in our time, and we find there most philosophical definitions of offences given after mature consideration by the great Jurist. It will perhaps be a surprise to some of our readers to learn that seven years' imprisonment can still be given for perjury, and that a solicitor who practices in any suit or action after having been convicted of forgery, or common barratry, is liable to seven years' penal servitude, after the matter has been examined by the judge or judges "in a summary way in open Court," though the abolition of this last offence was recommended by the Criminal Law Commissioners.

A Handbook of Legal Correspondents. London: Sweet & Maxwell. 1904. As an International legal directory we should say that this little book ought to be of much service to business men in general, as it contains the name of a legal practitioner in every place of importance throughout the world. Moreover, the names which appear in the book have been selected solely on the ground that they are believed to be trustworthy and satisfactory. No consideration of any kind has been asked or obtained from any of the persons whose names are published, and they have been selected solely on the recommendation of Bankers, Consuls, and other reliable sources, the compilers having taken great trouble in endeavouring to ensure that the names given are those of reliable firms only. With this guarantee from a firm of the high standing of Messrs. Sweet & Maxwell, Company Secretaries and Directors and others, who so often want to know off-hand who is the best and most reliable lawyer in a certain place, may with confidence consult this handy little register.

CONTEMPORARY FOREIGN LITERATURE.

Protesta de Colombia contra el Tratado entre Panama y los Estados Unidos. By LUIS CARLOS RICO, Minister of Foreign Affairs. Bogotá, 1904.

This is a protest, ineffectual as we all know, against the recognition of Panama as an independent state. The point depends on both history and the writings of jurists. Out of the mouth of Wheaton himself Señor Rico claims to convict the United States of a breach of international obligation.

PERIODICALS.

Journal du Droit International Privé. 1904. Nos. V, VI. Paris.

This number contains a continuation of the valuable study of the doctrine of *renvoi* by Dr. Ligeoix. An article with more humour in it than legal reviews generally offer is that on *La Vie juridique dans le Far-West américain* by M. Nerinck. An interesting contribution is that by M. Ligneul on the position of Christians in Japan, a commentary on the clause of the Japan Constitution of 1889, under which religious liberty is accorded, provided that public order be not disturbed.

Deutsche Juristen-Zeitung. 1904. 1 July—15 Sept. Berlin.

From an article on p. 771 we find how far foreign States surpass us in legislation for the protection of antiquities and historic monuments. We have little in the United Kingdom, but the somewhat inadequate provisions of the Ancient Monuments Protection Acts, 1882 and 1892. It is worth notice that, by the Civil Code, s. 127, the telephone (*Fernsprecher*) is expressly mentioned as a means of concluding contracts *inter absentes*. On this provision Dr. Frankenburg has a learned commentary at p. 844.

Giustizia Penale. 1904. 3 June—7 Sept. Rome.

At p. 802 is a case on all-fours with the well-known English case of *Reg. v. Most* [1881], 7 Q. B. D. 244, and decided on the same grounds. At p. 1145 is an interesting case illustrative of the article by Mr Cox-Sinclair in the August *Law Magazine and Review*. Two advocates refused to appear in defence of a prisoner before the Court of Assize at Vercelli. The Court, acting under a law of 1874, allowing a pecuniary finetto to be inflicted in such a case, inflicted such a fine, and the sentence was affirmed on appeal.

JAMES WILLIAMS.

Books received, reviews of which have been held over owing to pressure on space :—Bate's *Notes on the Doctrine of Renvoi in International Law*; Symonds' *The Relieving Officer*; Lushington's *Summary Jurisdiction (Married Women) Act 1895*; Duckworth's *Charter Parties and Bills of Lading*; Goddard's *Law of Easements*; Lushington's *Law of Affiliation and Bastardy*; Keen's *Markets, Fairs and Slaughter-Houses*; Powell's *Law of Evidence*; Ellisen's *Trust Investments*; Topham's *Principles of Company Law*; Underhill's *Trusts and Trustees*; Key and Elphinstone's *Precedents in Conveyancing*; Chitty on *Contracts*; Lewin's *Law of Trusts*; Westlake's *International Law, Part I*; Wilson's *Law in Business*; Willis and Oliver's *Roman Law Examination Guide*; Clerk and Lindsell on *Torts*.

Other Publications received :—*The Quarterly Note-ur, No. 1*; *Transactions of the Medico-Legal Society, Vol. I*; *The Shakespeare Story*. By G. Pitt-Lewis, K.C. (Swan, Sonner, Rhein and Co.)

The *Law Magazine and Review* receives or exchanges with the following amongst other publications :—*Review of Reviews*, *Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Canada Law Journal*, *Canada Law Time*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kalghatwar Law Reports*, *The Lawyer (India)*, *South African Law Journal*.

